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In The

Supreme Court of the United States

October Term, 1992

ALBERT S. GOODNER, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. In interpreting administrative regulations that are or could be the basis of a criminal prosecution, is a court to apply the "rule of lenity" and strictly construe applicable regulatory provisions without deferring to administrative policy statements, interpretations, or other agency guidance?

2. As interpreted using the "rule of lenity," does the Environmental Protection Agency's ("EPA") listing description for a hazardous waste assigned code F002, and found at 40 C.F.R. § 261.31(a), include paint waste generated in preparing aircraft for repainting?

3. As interpreted using the "rule of lenity," do EPA's hazardous waste regulations, in the absence of the "mixture" rule, implicitly make hazardous any waste that "contains" a hazardous waste?

4. As interpreted using the "rule of lenity," does the term "release," as used in § 103 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), mean *any* contact of a reportable quantity of a hazardous substance with soil, air, or water, or must there be some movement of the hazardous substance *into* the environment after the initial contact before a release occurs?

LIST OF PARTIES

United States of America
Goodner Brothers Aircraft, Inc.
Albert S. Goodner, Jr.

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Albert S. Goodner, Jr. respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered on June 4, 1992.

OPINIONS

The opinion of the Court of Appeals for the Eighth Circuit is reported at 966 F.2d 380 (8th Cir. 1992), and is reprinted in the appendix. Appendix ("App.") at 22.

The sentencing order of the United States District Court for the Western District of Arkansas (Waters, D.J.), has not been reported. It is reprinted in the appendix. App. at 9.

JURISDICTION

Invoking federal jurisdiction under 18 U.S.C. § 3231, the United States returned an indictment against Petitioner on October 3, 1990, based on alleged violations of 42 U.S.C. § 6928(d) and 42 U.S.C. § 9603(b).

The jurisdiction of the Court to review the judgment and opinion of the Eighth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Section 103(a)-(b) of CERCLA, 42 U.S.C. § 9603(a)-(b), is reprinted in the appendix. App. at 42-43.

40 C.F.R. § 261.3 is reprinted in the appendix. App. at 46-51.

40 C.F.R. § 261.31(a) is reprinted in pertinent part in the appendix. App. at 54.

STATEMENT OF THE CASE

I.

COURSE OF PROCEEDINGS AND DISPOSITION IN COURTS BELOW

On October 3, 1990, a fourteen count indictment was returned against three companies and three individuals, including Goodner Brothers Aircraft, Inc. ("Goodner Brothers Aircraft") and Albert S. Goodner, Jr., for alleged violations of the Clean Water Act, 33 U.S.C. §§ 1251 to 1387, the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901 to 6991i, and the Comprehensive Environmental Response, Compensation, and Liablity Act ("CERCLA"), 42 U.S.C. §§ 9601 to 9675. All charges were based on the handling by the defendants of paint waste generated during the repainting of aircraft.

The trial began January 28, 1991, and concluded February 2, 1991. At the start of the trial, three of the fourteen counts were dismissed. The jury acquitted all defendants on the first count (discharge of pollutants into waters of the United States without a permit), and a judgment of acquittal was entered on count two (conspiracy to dispose of hazardous waste without a permit). The jury was unable to reach a verdict on the remaining counts and a mistrial was declared as to those counts.

A second indictment, containing nine counts, was then returned against Goodner Brothers Aircraft and Albert S. Goodner, Jr. App. at 1. Four of the counts alleged a failure to notify the EPA of four separate releases of hazardous substances (supposedly the paint waste) into the environment, as required by CERCLA.

Five of the counts alleged various violations of RCRA. The jury convicted Goodner Brothers Aircraft on all five of the RCRA counts. Mr. Goodner was inconsistently found not guilty on four of the RCRA counts, guilty on one of the RCRA counts, and not guilty on one of the CERCLA counts, but guilty on three of the CERCLA counts. App. at 9.

Mr. Goodner was subsequently sentenced on June 24, 1991, to a term of imprisonment of fifteen (15) months and one (1) year of supervised release. App. at 9. Goodner Brothers Aircraft was fined $150,000.00. *Id.*

The Eighth Circuit reversed and remanded for new trial the RCRA convictions of Goodner Brothers Aircraft and Mr. Goodner, but sustained the CERCLA convictions of Mr. Goodner. App. at 22.

The court of appeals found that the RCRA convictions could have resulted from the jury's use of an invalidated regulation in deciding if the paint waste was hazardous. But according to the court, in making the same analysis to determine guilt under the CERCLA counts, the jury could not have used and did not use the invalidated regulation.

A timely filed Petition for Rehearing raising the arguments advanced here – misinterpretation of EPA's hazardous waste regulations and § 103 of CERCLA; a result, in part, of disregarding the "rule of lenity" – was summarily denied in an order dated July 7, 1992. App. at 36.

The government has decided not to retry the RCRA counts.

II.

FACTUAL BACKGROUND

Goodner Brothers Aircraft, of which Mr. Goodner is the president and sole shareholder, repaints aircraft. The company was born in the back of a pickup truck. It prospered through the initiative and hard work of Mr. Goodner, a high school graduate and veteran. It is still relatively small, with approximately one-hundred employees – none lawyers or engineers. It is the archetype of the small business upon which this country is built.

The initial step in the repainting process is the removal of existing paint, using a commercial paint remover containing the solvent methylene chloride as the main active ingredient. The paint remover is applied to the aircraft to allow the solvent to come in contact with and soften resins in the paint that normally cause adhesion of the paint to metal. As the resins soften, paint no longer adheres, thereby allowing removal by brushing the paint off or applying water under pressure. The removal process generates a waste consisting of peeled paint or paint chips with absorbed paint remover, some limited amount of uncombined paint remover, and water.

During the time relevant to this action, the paint waste was collected in piles on the floor of the building where repainting occurred, and shoveled into containers. According to the government, on four occasions the containers were loaded into a truck or flat-bed trailer and transported during normal business hours on public highways to Mr. Goodner's farm. There, the material was placed into three depressions in deposits of clay – two natural and one man-made. No mixing of the paint waste

with any other material occurred from the time of generation through placement at the farm. Neither Goodner Brothers Aircraft nor Mr. Goodner notified EPA or other regulatory authorities about the placement of paint waste at the farm, because they had no reason to believe the placement created a threat to the environment.

At the trial there was no specific identification of any substantial present or potential hazard to human health or the environment presented by paint waste. Anecdotal testimony from employees suggested contact of unprotected skin with the paint remover could cause a reaction. There was also no evidence that the placement of the paint waste at Mr. Goodner's farm ever caused any environmental harm or adverse environmental impact. The paint waste placed in the depressions at the farm was not found to have moved into the soil, did not enter ground water, did not reach surface waters, and was not demonstrated to cause releases to the air. The paint waste simply stayed where it was put, until Mr. Goodner moved it to a disposal facility.

III.

REGULATORY BACKGROUND

If the placement of the paint waste at Mr. Goodner's farm constituted a "release" of a "hazardous substance" in a "reportable quantity," notification was required under § 103 of CERCLA. 42 U.S.C. § 9603(a). The "release" was supposedly the placement of materials into the depressions at the farm. The "hazardous substance" was supposedly the paint waste. In the context of this case, *only if* the paint waste was considered a "hazardous

waste" under RCRA could it be a "hazardous substance" under CERCLA. Determining if the paint waste is a "hazardous waste" requires a journey into what may be the densest and deepest regulatory forest our modern bureaucratic state has ever cultivated.

In adopting RCRA, Congress directed EPA to initially develop criteria: (1) for identifying the characteristics of hazardous wastes, and (2) for determining if a waste should be "listed," i.e., specifically described as a hazardous waste. 42 U.S.C. § 6921(a). Based on the developed criteria, EPA established two independent methods of identifying a waste as hazardous. First, the agency isolated four characteristics – ignitability, corrosivity, reactivity, and toxicity – which if exhibited by a waste rendered it "hazardous." *See* 45 Fed. Reg. 33,066, 33,106 (May 19, 1980). Second, EPA decided to designate certain wastes as hazardous by "listing" them – that is specifically describing them.[1] *Id.*

EPA, apparently concerned that the regulated community could circumvent a "hazardous waste" designation by combining a "hazardous waste" with a "non-hazardous waste" and asserting that the product was not subject to regulation, developed the "mixture" rule. That provision, which was not part of the originally proposed hazardous waste rules, 43 Fed. Reg. 58,946 (December 18, 1978), appeared for the first time in May 1980. 45 Fed. Reg. 33,066 (May 19, 1980). The "mixture" rule provided that combining a "non-hazardous waste" and *any* amount

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[1] Each listed waste is assigned a unique letter and number code to expedite recordkeeping tasks. *See* 40 C.F.R. §§ 261.31(a), 261.32.

of a "*listed* hazardous waste" created a mixture that must be managed as hazardous unless it was delisted i.e., found to be non-hazardous. 40 C.F.R. § 261.3(a)(2)(ii)-(iv); 40 C.F.R. §§ 260.20, 260.22.

In Mr. Goodner's care, the paint waste could be considered hazardous: only if it exhibited one of four characteristics; or if it had been specifically identified (that is "listed") by EPA as hazardous.[2] The paint waste was not shown to exhibit any of the four characteristics. The Eighth Circuit, however, concluded that the paint waste was a "listed" hazardous waste.

REASONS WHY THE WRIT SHOULD BE GRANTED

Two *independent* grounds are presented to establish that the Eighth Circuit, in failing to follow the "rule of lenity," wrongly upheld Mr. Goodner's convictions for failure to tell the EPA when he placed paint waste at his farm. First, because the material he placed at the farm was not a hazardous waste, no duty to report existed. Second, the manner of placement did not trigger a duty to report. Correcting the Eighth Circuit's errors is of immediate concern to Mr. Goodner, who faces fifteen months in prison, but it is also vitally important to the thousands of other individuals and businesses subject to

[2] As discussed below EPA's "mixture" rule was found legally inapplicable to this proceeding. A waste "derived-from" (i.e., generated from the treatment, storage or disposal of a hazardous waste) is also considered hazardous unless delisted. 40 C.F.R. § 261.3(a)(2). This rule, referred to as the "derived-from" rule, has no direct application to this case.

RCRA and CERCLA. The method of correction, appropriate judicial use of the "rule of lenity," is of critical concern to anyone potentially subject to criminal prosecution for violating a regulation.

I.

WITH RESPECT TO THE PROSECUTION OF "REGULATORY" CRIMES, THIS CASE PRESENTS A TIMELY, IMPORTANT, AND UNIQUE OPPORTUNITY FOR THE COURT: (1) TO REAFFIRM THAT THE "RULE OF LENITY" APPLIES; (2) TO CLARIFY THE ROLE OF THE ASSOCIATED DOCTRINE OF DEFERENCE TO AGENCY INTERPRETATIONS; AND (3) TO INSTRUCT LOWER COURTS TO ANALYZE CRITICALLY REGULATIONS DEFINING CRIMINAL CONDUCT.

Until the turn of the century, it was generally accepted that defining federal crimes was solely a congressional prerogative. By 1911 the Court had explicitly recognized that failure to follow the regulations of an administrative agency could constitute a crime. *United States v. Grimaud,* 220 U.S. 506 (1911). Although agencies may have been slow initially to use criminal proceedings as a tool to achieve compliance with regulatory programs, they are now making up for lost time, especially in the environmental area.

For instance, the number of EPA special agents assigned to criminal enforcement is expected to quadruple between 1991 and 1995, from *50* to *200.* James M. Strock, *Environmental Criminal Enforcement Priorities for the 1990's,* 59 GEO. WASH. L. REV. 916, 926 (1991). The

Department of Justice ("DOJ") increased its staff of environmental prosecutors from *four* in 1981 to *thirty-four* in 1991. 22 Env't Rep. [File Binder] (BNA) at 484 (June 21, 1991). Since fiscal year 1983, the DOJ's Environmental Crimes Section has indicted 761 individuals and corporations; and in fiscal year 1990, DOJ indicted 33 percent more defendants than the previous year. Judson W. Starr, *Turbulent Times at Justice and EPA: The Origins of Environmental Criminal Prosecution and the Work that Remains*, 59 GEO. WASH. L. REV. 900, 901 n.3 (1991). This heightened emphasis on criminal prosecution in the environmental arena has triggered an avalanche of law review articles.[3]

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[3] Brown, Harris & Cox, *The Liability of the Employees of a Federal Agency Charged With Criminal Environmental Violations: Do the Rules of Fair Play Apply to the Football?*, 35 FED. BAR NEWS & J. 441 (1988); Starr, *Countering Environmental Crimes*, 13 B.C. ENVTL. AFF. L. REV. 379 (1986); Note, *In Search of Effective Hazardous Waste Legislation: Corporate Officer Criminal Liability*, 22 VAL. U.L. REV. 385 (1988); McElfish, *State Hazardous Waste Crimes*, 17 ENVTL. L. REP. (Envtl. L. Inst.) 10,465 (1987); McMurry & Ramsey, *Environmental Crime: The Use of Criminal Sanctions in Enforcing Environmental Laws*, 18 LAND USE & ENT'T. L. REV. 427 (1987); Habicht, *The Federal Perspective on Environmental Criminal Enforcement: How to Remain on the Civil Side*, 17 ENVTL. L. REP. (Envtl. L. Inst.) 10,478 (1987); Seymour, *Civil and Criminal Liability of Corporate Officers Under Federal Environmental Laws*, 20 ENV'T REP. (BNA) 337 (1989); Glenn, *The Crime of "Pollution": The Role of Federal Water Pollution Criminal Sanctions*, 11 AM. CRIM. L. REV. 835 (1973); Comment, *Putting Polluters in Jail: The Imposition of Criminal Sanctions on Corporate Defendants Under Environmental Statutes*, 20 LAND & WATER L. REV. 93 (1985); Reisel, *Criminal Prosecution and Defense of Environmental Wrongs*, 15 ENVT'L. L. REP. (Envt'l. L. Inst.) 10,065 (1985); Comment, *Prosecuting Corporate Polluters: The Sparing Use of Criminal Sanctions*, 62 U. DET. L. REV. 659 (1985); Note, *Element Analysis Applied to Environmental Crimes: What Did They Know and When*

Their number is but a small fraction of what has been written in newspapers, magazines, and trade publications.

During the same period when prosecution of "regulatory" crimes and, in particular environmental crimes, was becoming more common, the Court was in civil cases requiring more judicial deference to an agency's interpretation of both organic statutes and its own regulations. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). That trend is at odds with the Court's previous recognition that with "regulatory" crimes the "rule of lenity" applies, regulations are to be strictly construed, and deferring to agency "interpretations" is inappropriate. *M. Kraus & Brothers, Inc. v. United States*, 327 U.S. 614 (1946). Recent law review commentary has highlighted this tension. Note, *Increased Judicial Scrutiny for the Administrative Crime*, 77 CORNELL L. REV. 612 (1992). Unfortunately, and as evidenced by this case, the application of the "rule of lenity" to "regulatory" crimes has often been largely brushed aside by the lower courts. Indeed, the judiciary's movement toward a

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Did They Know It?, 19 B.C. ENVTL. AFF. L. REV. 53 (1988); Comment, *The Criminal Responsibility of Corporate Officials For Pollution of The Environment*, 37 ALB. L. REV. 61 (1972); Aurelius, Letton, Macbeth, Menotti & Lentin, *Review of Criminal Provisions in Environmental Law: Task Force Report*, 40 BUS. LAW 761 (1984); DeCicco & Bonanno, *A Comparative Analysis of the Criminal Environmental Laws of the Fifty States: The Need for Statutory Uniformity as a Catalyst for Effective Enforcement of Existing and Proposed Laws*, 9 CRIM. JUST. Q. 216 (1988); Perry, *Criminal Enforcement Priorities for the Environmental Protection Agency*, 13 ENVTL. REP. (BNA) 859 (1982); *Criminal Enforcement of Environmental Laws Seeks Deterrence Amid Need for Increased Coordination, Training, and Public Awareness*, 17 ENVTL. REP. (BNA) 800 (1986).

less demanding review of agency actions in a civil context has regularly allowed the more deferential civil approach to influence regulatory interpretations in a criminal setting.

By granting review here, the Court can provide an urgently needed reaffirmation of the aggressive role the judiciary is to play in interpreting regulations and statutes where "regulatory" crimes are involved. The need for such a reminder is not limited to this case. It is also required for the multitude of "regulatory" crimes cases that are and will be a logical outgrowth of our ever expanding bureaucratic state, and especially for the explosion in the prosecution of environmental crimes. Significantly, if lower courts do not have a proper appreciation for their role, an unlevel playing field will exist for the trial of "regulatory" crimes. Even more importantly, failure to address and correct the Eighth Circuit's misunderstanding of the law will send a clear signal that the Court is retreating from the "rule of lenity" in the "regulatory" crimes arena. Such a signal is at odds with the Court's recent emphasis on the importance of that rule in criminal cases, *and* in civil actions where a criminal statute is interpreted. *United States v. Thompson/Center Arms Co.*, ___ U.S. ___, 112 S.Ct. 2102, 2110 n. 10 (1992). To avoid confusion regarding the proper approach to interpret regulations in a "regulatory" crimes proceeding, the Court should review this case and provide needed guidance to the lower courts.

II.

IN CONCLUDING THE PAINT WASTE WAS HAZARDOUS, THE EIGHTH CIRCUIT DISREGARDED THE "RULE OF LENITY" IN DIRECT CONFLICT WITH DECISIONS OF THIS COURT APPLYING THE RULE.

At trial the government sought to prove that the paint waste was a "mixture" of the paint on the aircraft and a purported listed hazardous waste – the paint remover.[4] In other words, the paint waste was supposedly hazardous under EPA's "mixture" rule. In fact, however, when initially combined the paint and paint remover were *not* wastes. A mixing of non-wastes could not trigger the "mixture" rule, which *only* applied to a combination of *wastes*. 40 C.F.R. § 261.3(a)(2)(iii). In this case, the paint remover, containing the solvent methylene chloride, when combined with paint, generated a unitary, not a mixed, waste – namely paint waste.

While this case was on appeal, the "mixture" rule was invalidated because EPA failed under the Administrative Procedure Act to properly propose the rule for

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[4] The government's testimony was generally to the effect the paint waste "contained" spent solvent. The term "contained" is synonymous with "mixed" under EPA's hazardous waste rules. For instance, 40 C.F.R. § 261.3(d) identifies how the following three types of hazardous waste can avoid regulation; (1) "listed" wastes, (2) those that "contain" a listed waste, and (3) those that are "derived-from" a listed waste. The only hazardous waste identified by EPA that could "contain" a listed waste is a waste considered hazardous under the "mixture" rule.

public comment. *Shell Oil Company v. Environmental Protection Agency*, 950 F.2d 741 (D.C. Cir. 1991). Based on the *Shell* decision, the Eighth Circuit correctly concluded that the "mixture" rule was void from its inception and could not be used in Mr. Goodner's criminal case to support a finding that the paint waste was a "hazardous waste." *Goodner* at 384-385; App. at 27-29. Because the wording of the jury instructions applicable to the RCRA counts, could have led the jury to convict on the basis of the "mixture" rule, those convictions were overturned. *Goodner* at 384, 385; App. at 27, 30.

The court of appeals nonetheless believed that the jury instructions neither required nor allowed the jury to rely upon the "mixture" rule in determining, for purposes of the CERCLA counts, whether the paint waste was a "hazardous substance" because it was a "hazardous waste." Compare App. at 26, 30, 63-66 with App. at 31-32, 67-69. The Eighth Circuit then read the CERCLA instruction defining the term "hazardous substance" as correctly specifying that the paint waste itself could be considered the "listed" hazardous waste – "spent halogenated solvent; assigned code F002." App. at 32-33. The reasoning of the court of appeals, however, supplied a link explicitly missing in the instructions: that the paint waste (as opposed to the paint remover) was a spent halogenated solvent because it *contained* paint remover that consisted in part of a solvent identified in the listing description for the F002 waste. *Id.* The Eighth Circuit's analysis is but a transparent contrivance to resurrect EPA's voided "mixture" rule, without using the word "mixture."

The Eighth Circuit's construction of the description of a F002 waste, if allowed to stand, repudiates the long

recognized "rule of lenity," which mandates that in criminal prosecutions, whether based on statutes or regulations, the language describing illegal conduct must be strictly construed. As stated by Chief Justice Marshall:

> The rule that penal laws are to be construed strictly, is, perhaps, not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the court, which is to define a crime, and ordain its punishment.

United States v. Wiltberger, 34 U.S. 76, 95, 5 Wheat. 37, 42 (1820).

The Court has been a staunch defender of the "rule of lenity." *United States v. Boston and Maine Railroad,* 380 U.S. 157, 160 (1965); *United States v. Bass,* 404 U.S. 336, 398 (1971); *Williams v. United States,* 458 U.S. 279, 286 (1982); *Crandon v. United States,* 494 U.S. 152 (1990). The Court has also made it clear the rule applies to administrative regulations, although its application in that context has been encountered far less often. *But see M. Kraus & Brothers, Inc. v. United States,* 327 U.S., 614 (1946).[5]

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[5] There should be two corollaries to the "rule of lenity" in a "regulatory" crimes context. First, *Chevron USA, Inc. v. NRDC, Inc.*, 467 U.S. 37 (1984), which requires considerable deference to an agency's interpretation of statutes or regulations, should have no application. While the D.C. Circuit has adopted this view, *United States v. McGoff,* 831 F.2d 1071, 1077, 1080 n. 17 (D.C. Cir. 1987), the Ninth Circuit has recently suggested "it is unclear whether an agency's interpretation of a *criminal* statute is entitled to deference under *Chevron*." *United States v. Douglas,*

Understanding how the Eighth Circuit wrongly expanded the description of the listed hazardous waste – "spent halogenated solvents," assigned code F002 – starts with the following description of that waste set forth in 40 C.F.R. § 261.31(a):

> (a) The following solid wastes are listed hazardous wastes from non-specific sources . . .

Industry and EPA hazardous waste No.	Hazardous Waste	Hazard Code
F002	The following spent halogenated solvents: . . . methylene chloride . . . ; all spent solvent mixture/blends containing, before use, a total of 10% or more (by volume) of one or more of the above halogenated solvents . . . ; and still bottoms from the recovery of the spent solvents and spent solvent mixtures.	(T)

The F002 listing (that is, the description under the heading "Hazardous Waste") *does not* include the term "paint waste" or otherwise describe the waste generated by

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___ F.2d ___, 1992 W.L. 194755 (9th Cir. 1992). Second, when an agency develops regulations it can criminally enforce, it is required to interpret narrowly the organic statue directing the adoption of such rules. *Federal Communications Commission v. American Broadcasting Company*, 347 U.S. 284, 296 (1954).

Goodner Brothers Aircraft. It does mention methylene chloride (which is *present* in the paint waste), but as a stand-alone waste *not* as a component of another waste. The reason for the omission is simple to find: EPA's "mixture" rule determined, to the extent deemed appropriate by EPA, whether one waste containing another waste was a hazardous waste.

By its terms then, the F002 listing is limited to a waste that is a "spent solvent" – i.e., a solvent that can no longer dissolve another substance, not a waste that may contain a spent solvent.[6] Here the paint that became a waste was not originally a solvent, because in place, on the aircraft, it could dissolve nothing. Therefore, when it was softened and removed it could not become a "spent solvent," having never been a solvent. What was generated was paint, softened and removed from an aircraft with associated solvent, not spent solvent.

Paint waste is not described by the EPA's listing for a F002 waste. To find otherwise, as the Eighth Circuit did in its rush to replace the "mixture" rule, requires placing a gloss on the listing for F002 wastes either inconsistent

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[6] A solvent works by "breaking up" the attractive forces between the molecules of the material being dissolved, thereby causing those molecules to be dispersed and suspended throughout the solvent. SIENKO & PLANE, CHEMISTRY 210-211 (4th Ed. 1971). This breakup occurs because the attractive forces between the solvent and the material being dissolved are greater than the attractive forces holding together the material to be dissolved. *Id.* As material is dissolved, the attractive capability of the solvent to further dissolve material is diminished. *Id.* Once the solvent can no longer "breakup" material it is considered "spent."

with its plain meaning or at odds with a strict construction of its terms.

The Eighth Circuit's inappropriately expansive reading of the F002 listing is in direct conflict with the teaching of the Court in *M. Kraus & Brothers, Inc. v. United States*, 327 U.S. 614 (1946), where in applying the "rule of lenity" to an ambiguous regulatory provision the Court noted:

> A prosecutor in framing an indictment, a court in interpreting the Administrator's regulations or a jury in judging guilt cannot supply that which the Administrator failed to do by express word or fair implication. Not even the Administrator's interpretations of his own regulations can cure an omission or add certainty and definiteness to otherwise vague language. The prohibited conduct must, for criminal purposes, be set forth with clarity in the regulations and orders which he is authorized by Congress to promulgate under the Act.

Id. at 622.

In *Kraus* the defendant's insistence that butchers who purchased poultry from him during the Thanksgiving season also buy chicken feet or chicken skin was found to criminally violate a regulation implementing the Emergency Price Control Act of 1942. *Id.* at 616-617. The defendant asserted his conduct was not proscribed by the regulation. The government argued the defendant's tying arrangement violated § 1429.5 of the Price Control Act's regulations, which read as follows:

> Price limitations set forth in this revised maximum price regulation No. 269 shall not be

> evaded whether by direct or indirect methods, in connection with any offer, solicitation, agreement, sale, delivery, purchase or receipt of, or relating to, the commodities prices of which are herein regulated, alone or in conjunction with any other commodity or by way of commission, service, transportation or other charge, or discount, premium, or other privilege or other trade understanding or otherwise.

Id. at 620.

The Court assumed that a regulation could have been adopted prohibiting all tying agreements and combination sales. *Id.* at 622. Nevertheless, the Court refused to interpret § 1429.5 as doing so. As the Court noted, "no specific mention is made of tying agreements or combination sales." *Id.* at 623.

Nevertheless, the government asserted that a price limitation on the primary commodity (poultry) was evaded, in the words of the regulation, "in conjunction with any other commodity" (chicken feet or chicken skins), and that the government's position in the criminal case was consistent with prior interpretations by the Administrator of the regulatory provision in question. *Id.*

The Court strictly construed the regulatory language relied upon by the government as only prohibiting "evasions through the use of tying agreements where the tied-in commodity is worthless or is sold at an artificial price, thereby hiding an above-ceiling price for the primary commodity." *Id.* In the Court's view the regulatory language was not specific enough to apply where a secondary product has value, which it did in that case, and is sold at its ceiling or market price. *Id.*

In responding to the government's plea that a broader interpretation was necessary to prevent profiteering and to ensure administrative consistency the Court noted:

> All of this may well be true. But these are administrative judgments with which the courts have no concern in a criminal proceeding. We must look solely to the language actually used in § 1429.5. And when we do we are unable to say that the Administrator has made his position in this respect *self-evident* from the language used.

Id. at 625 (emphasis supplied).

The teaching of *Kraus* is simple. Does the language of the regulation make "self-evident" what conduct is criminal? As applied here, is it self-evident from the F002 listing that the paint waste was hazardous? The answer can only be no.

Nor does any other provision of EPA's hazardous waste regulations supply the rule devised and applied by the Eighth Circuit.[7] The paint waste did not exhibit any

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[7] EPA apparently shares the view that nothing in the plain meaning of its hazardous waste regulations describes the "contained-in" rule invented by the Eighth Circuit. If such a provision existed, EPA would not have found it necessary to make explicit that a listed hazardous waste placed in a container should still be treated as a hazardous waste. 40 C.F.R. § 261.7(a)(2). App. at 52. If a material that contains a hazardous waste was always transformed into a hazardous waste, as the Eighth Circuit believes § 261.7(a)(2) is unnecessary. Additionally, although not appropriate for use by the government in a criminal case, but certainly an admission by the government,

hazardous characteristic. It was not described by any other "listing."[8] It is not a hazardous waste.

By disregarding the "rule of lenity" the Eighth Circuit has replaced the "mixture" rule with a much more onerous cousin – a "contained-in" rule. This new rule, adopted without analysis or comment in a criminal prosecution, will require generators to parse their wastes to determine if any component or combination of components could be described by a listing for a hazardous waste – a burden they have not until now been required by EPA to shoulder. It is indeed ironic that after the Eighth Circuit's decision in a criminal case the reach of EPA's hazardous waste regulations has *expanded*. The court of appeals has turned the "rule of lenity" on its head.

The Eighth Circuit has thus created a precedent directly at odds with the Court's ruling in *Kraus*, and by failing to follow *Kraus*, has exponentially expanded the scope of EPA's hazardous waste regulations. The decision

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an EPA directive makes clear a waste is not hazardous simply because the way it is generated causes it to contain material that might otherwise be considered a hazardous waste. App. at 55.

[8] At one time, the agency had a separate listing for paint waste. EPA's initial description of proposed "listed" wastes included two distinct categories; (1) "Paint Waste" and (2) "Waste paint and varnish remover or stripper". 43 Fed. Reg. 58,946, 58,957 (December 18, 1978). In the May 1980 final rule, those two separate categories were combined into a single listing – "Paint residues generated from industrial painting". 45 Reg. 33,066, 33,117 (May 19, 1980). That listing was adopted on July 16, 1980, and suspended indefinitely on January 16, 1981, because it was overly broad. 46 Fed. Reg. 4617 (January 16, 1981).

will create confusion where none should exist and subject many members of the regulated community to criminal liability not apparent from the plain meaning of EPA's hazardous waste regulations. Only review by the Court can prevent those results.

III.

THE EIGHTH CIRCUIT'S DECISION INTERPRETING A "RELEASE" UNDER CERCLA AS THE PLACEMENT OF A HAZARDOUS SUBSTANCE INTO A FACILITY THAT IS EXPOSED TO THE ENVIRONMENT DIRECTLY CONFLICTS WITH DECISIONS OF THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND THE FIFTH CIRCUIT.

Section 103 of CERCLA imposes an obligation on the owners and operators of nearly every commercial and industrial operation in the nation to notify EPA of any "release" "from a facility" "of a reportable quantity of a hazardous substance." 42 U.S.C. § 9603(a). Given that there are over 1800 different materials identified as hazardous substances, including such ubiquitous materials as copper, ammonia, nickel, silver, and sodium, 40 C.F.R. § 302.4, virtually any spill of any material at a commercial or industrial facility will trigger the need to determine if there has been a "release." Because criminal penalties can attach for a failure to report, it is imperative that the regulated community have a clear understanding of the types of "releases" that require notification.

Unfortunately, the decision of the Eighth Circuit in this case leaves a clear split in authority regarding what constitutes a "release." The Eighth Circuit has adopted the broadest interpretation of the term. It is at odds with

the overall structure of CERCLA and inconsistent with the command of the "rule of lenity." That rule applies because this case is a criminal prosecution and because § 103 of CERCLA provides criminal sanctions for its violation. 42 U.S.C. § 9603(b).

Finding the correct meaning of the term "released" demands an involved analysis; the issue was briefed at length before the Eighth Circuit. The court of appeals, decided the question in five sentences. *Goodner* at 386; App. at 33. In the lower court's view, the containers holding paint waste were "facilities," the transfer of the material from those containers into the depressions at Mr. Goodner's farm constituted "dumping or disposing," (terms used to define the phrase "release"), and the depressions at the farm were "land surfaces," which are included in the definition of "environment." This analysis stands or falls on a crucial assumption – that mere *contact* between a hazardous substance and the environment is a reportable event. That superficially plausible position leads to absurd results.

For instance, the concrete floor of a building could be viewed as a land surface. Under the Eighth Circuit's view, a spill of a reportable quantity of a hazardous substance in a building would require a report. Yet even EPA agrees no report is necessary in such a case. 48 Fed. Reg. 23,552, 23,555 (May 25, 1983). Likewise in the lower court's view, placing a hazardous substance into an unenclosed container, empty save for air, would constitute a release, because that placement would literally be a discharge into "air" – also part of the "environment." In short,

under the Eighth Circuit's construct, almost every movement of a hazardous substance becomes a release, defeating the purpose of the notification requirement – to alert EPA to situations of potentially serious environmental concern.

The other two circuits that have addressed the same issue have adopted a more commonsense approach. For instance, in resolving a challenge to EPA's regulations regarding CERCLA release-reporting requirements, the D.C. Circuit concluded that Congress did not intend in CERCLA that "exposure" to the environment was the same as movement "into" the environment. *The Fertilizer Institute v. United States Environmental Protection Agency,* 935 F.2d 1303, 1309-1310 (D.C. Cir. 1991). In particular, the D.C. Circuit rejected EPA's interpretation of the term "release" as including placement of a hazardous substance in an unenclosed structure open to the atmosphere. In other words, exposure to the air is not a release. Under that analysis, simple contact between a hazardous substance and a land surface likewise would not constitute a "release."[9]

The Fifth Circuit reached a similar conclusion in *United States v. Baytank (Houston), Inc.*, 934 F.2d 599 (5th Cir. 1991), when it agreed with the district court that the

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[9] It is problematic whether a hazardous substance could come in contact with water and not be released into that medium. The physical properties of water are such that any contact will immediately result in movement from the point of contact further into the water. The same effect does not necessarily occur when air or soil come in contact with a hazardous substance.

movement of 4,000 pounds of acrylonitrile, a hazardous substance with a reportable quantity of 100 pounds, into a containment structure as a result of a tank overflow did not constitute a release "into" the environment. *Id.* at 619. The movement was instead from one facility to another, from the tank to the containment area. *Id.* But the Fifth Circuit also made it clear that volatilization of material from the containment structure was a "release" to the *air* if what *escaped* through volatilization exceeded the reportable quantity. *Id.* at 620.

Not only does the construction adopted by the D.C. Circuit and the Fifth Circuit make practical sense, it also prevents a potential conflict between the terms "facility" and "environment" as used in § 103 of CERCLA. 42 U.S.C. § 9601(8)-(9). Those words are so broadly defined that without the practical understanding adopted in *Fertilizer Institute* and *Baytank,* there is no way to distinguish one from the other. In that circumstance, either no reporting requirements exist because the entire environment becomes a facility, or virtually any movement of material above a reportable quantity requires notification because all facilities are simply a subset of the environment. By making it clear that simple contact with or exposure to the environment does not constitute a release, the courts are recognizing that such initial placement simply creates a new "facility."[10] Only if there is

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[10] In another context EPA shared a similar view. The preamble to regulations implementing § 103 of CERCLA includes the following statement: "Thus the distinction between the "facility" (or "vessel") from which a substance is released and the "environment" into which a substance passes is the determining factor in requiring notification." 50 Fed. Reg. 13,455, 13,462 (Apr. 4, 1985).

further movement, for instance volatilization or migration into the soil subsequent to the initial contact or exposure, has a "release" occurred.

The distinction made by the D.C. Circuit and the Fifth Circuit also differentiates a "release" from a "threatened release" by recognizing that exposing the environment to a hazardous substance only creates a threat not an actual release. Section 103 of CERCLA does not require a report of "threatened" releases. 42 U.S.C. § 9603(a).

In this case the evidence at trial established no more than that paint waste came in contact with or was exposed to clay soils. The EPA could have tried to establish the paint waste migrated into the soils after the initial contact, or that the material placed in the depressions volatilized in a reportable quantity. It chose not to do so. Based on the proof the government did offer, Mr. Goodner would not have been convicted in the D.C. Circuit or the Fifth Circuit. As a result of the erroneous ruling of the Eighth Circuit, his conviction now stands.

In order to avoid uncertainty in the regulated community about the extent of the duty to provide notification under § 103 of CERCLA, the Court should review this case and resolve the existing conflict among the circuits.

CONCLUSION

Without a clear map and no compass, Mr. Goodner's journey through the forest of hazardous waste regulations placed him at the bottom of a concealed sinkhold. The Petition for a Writ of Certiorari should be granted to make the journey less difficult for all travelers – the courts, the agencies, and the regulated.

Dated: October 5, 1991.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

UNITED STATES OF AMERICA PLAINTIFF

v. CR. No. 90-20031-01, 04

GOODNER BROTHERS AIRCRAFT, INC., ET AL DEFENDANTS

INDICTMENT

The Grand Jury Charges:

COUNT ONE

1. At all times material herein, GOODNER BROTHERS AIRCRAFT, INCORPORATED (hereinafter GOODNER AIRCRAFT) and Goodner Brothers Farms were incorporated to do business in the State of Arkansas. GOODNER AIRCRAFT did business at the Intermountain Regional Airport in Mena, Arkansas. Goodner Farm is located in Ink, Arkansas. Both Mena and Ink, Arkansas are in the Western District of Arkansas.

2. At all times relevant herein, defendant ALBERT S. GOODNER, JUNIOR, a/k/a "JUNIOR" GOODNER, was President of GOODNER AIRCRAFT, and Goodner Farms. He was also the Operating Manager of these companies.

3. During all times relevant to this Count, the Resource Conservation and Recovery Act (hereinafter "RCRA") as amended, Title 42 United States Code, Sections 6901, et seq., provided that unless a facility was exempt under certain provisions not applicable here, no

hazardous wastes could be stored or disposed of without a permit authorized by the United States Environmental Protection Agency (hereinafter "EPA").

4. In or about February 1987, the exact date unknown to the Grand Jury, at Mena, within the Western District of Arkansas, GOODNER BROTHERS AIRCRAFT, INCORPORATED, and ALBERT S. GOODNER, JUNIOR a/k/a "JUNIOR" GOODNER, defendants herein, did knowingly dispose of and cause, counsel, command, induce and procure the disposal of hazardous wastes as defined in 40 C.F.R., 261, and Arkansas Hazardous Waste Management Code Section 4, including, but not limited to, spent halogenated solvents onto the Goodner Farms at Ink, Arkansas, without having obtained interim status or a permit for said disposal pursuant to Title 42, United States Code, Sections 6925 and 6926; all in violation of Title 18, United States Code, Section 2; Title 42, United States Code, Section 6928(d)(2)(A).

COUNT TWO

1. Paragraphs one through three of Count One of the Indictment are hereby realleged and incorporated by reference as though fully set forth herein.

2. From in or about June 1988 to in or about August 1988, the exact date unknown to the Grand Jury, at Mena, within the Western District of Arkansas, GOODNER BROTHERS AIRCRAFT, INCORPORATED, and ALBERT S. GOODNER, JUNIOR, a/k/a "JUNIOR" GOODNER, defendants herein, did knowing dispose of and cause, counsel, command, induce and procure the disposal of hazardous wastes as defined in 40 C.F.R., Part 261, and

Arkansas Hazardous Waste Management Code Section 4, including, but not limited to, spent halogenated solvents onto the Goodner Farms at Ink, Arkansas, without having obtained interim status or a permit for said disposal pursuant to Title 42, United States Code, Sections 6925 and 6926; all in violation of Title 18, United States Code, Section 2; Title 42, United States Code, Section 6928(d)(2)(A).

COUNT THREE

1. Paragraphs One through three of Count One of the Indictment are hereby realleged and incorporated by reference as though fully set forth herein.

2. From in or about September 1988 to in or about November 1988, the exact date unknown to the Grand Jury, at Mena, within the Western District of Arkansas, GOODNER BROTHERS AIRCRAFT, INCORPORATED, and ALBERT S. GOODNER, JUNIOR, a/k/a "JUNIOR" GOODNER, defendants herein, did knowingly dispose of and cause, counsel, command, induce and procure the disposal of hazardous wastes as defined in 40 C.F.R., Part 261, and Arkansas Hazardous Waste Management Code Section 4, including but not limited to spent halogenated solvents on the Goodner Farms at Ink, Arkansas, without having obtained interim status or a permit for said disposal pursuant to Title 42, United States Code, Sections 6925 and 6926; all in violation of Title 18, United States Code, Section 2; Title 42, United States Code, Section 6928(d)(2)(A).

COUNT FOUR

1. Paragraphs one through three of Count One of the Indictment are hereby realleged and incorporated by reference as though fully set forth herein.

2. On or about March 14, 1989, at Mena, within the Western District of Arkansas, GOODNER BROTHERS AIRCRAFT, INCORPORATED and ALBERT S. GOODNER, JUNIOR, a/k/a "JUNIOR" GOODNER, defendants herein, did knowingly dispose of and cause, counsel, command, induce and procure the disposal of hazardous wastes as defined in 40 C.F.R., Part 261, and Arkansas Hazardous Waste Management Code Section 4, including, but not limited to, spent halogenated solvents onto the Goodner Farms at Ink, Arkansas, without having obtained interim status or a permit for said disposal pursuant to Title 42, United States Code, Sections 6925 and 6926; all in violation of Title 18, United States Code, Section 2; Title 42, United States Code, Section 6928(d)(2)(A).

COUNT FIVE

1. Paragraphs one and two of Count One of the Indictment herein are hereby realleged and incorporated as though fully set forth herein.

2. In or about February 1987, the exact date unknown to the Grand Jury, a quantity in excess of the reportable quantity of hazardous substances was released into the environment without a federal permit at the GOODNER FARMS facility, in Ink, Arkansas.

3. Defendant ALBERT S. GOODNER, JUNIOR, a/k/a "JUNIOR" GOODNER, a person in charge of the Ink, Arkansas facility and having knowledge of the aforementioned release of hazardous substances into the environment without a permit, failed to notify the appropriate agency of the United States Government of such release of hazardous substances; in violation of Title 42, United States Code, Section 9603(b).

COUNT SIX

1. Paragraphs one and two of Count One of the Indictment herein are hereby realleged and incorporated as though fully set forth herein.

2. From in or about June 1988 to in or about August 1988, the exact date unknown to the Grand Jury, a quantity in excess of the reportable quantity of hazardous substances, was released into the environment without a federal permit at the GOODNER FARMS facility, in Ink, Arkansas.

3. Defendant ALBERT S. GOODNER, JUNIOR a/k/a "JUNIOR" GOODNER, a person in charge of the Ink, Arkansas facility and having knowledge of the aforementioned release of hazardous substances into the environment without a permit, failed to notify the appropriate agency of the United States Government of such release of hazardous substances; in violation of Titled 42, United States Code, Section 9603(b).

COUNT SEVEN

1. Paragraphs one and two of Count One of the Indictment herein are hereby realleged and incorporated as though fully set forth herein.

2. From in or about September 1988 to in or about November 1988, the exact date unknown to the Grand Jury, a quantity in excess of the reportable quantity of hazardous substances was released into the environment without a federal permit at the GOODNER FARMS facility, in Ink, Arkansas.

3. Defendant ALBERT S. GOODNER, JUNIOR a/k/a "JUNIOR" GOODNER, a person in charge of the Ink, Arkansas facility and having knowledge of the aforementioned release of hazardous substances into the environment without a permit, failed to notify the appropriate agency of the United States Government of such release of hazardous substances; in violation of Title 42, United States Code, Section 9603(b).

COUNT EIGHT

1. Paragraphs one and two of Count One of the Indictment herein are hereby realleged and incorporated as though set forth herein.

2. On or about March 14, 1989, a quantity in excess of the reportable quantity of hazardous substances, was released into the environment without a federal permit at the GOODNER FARMS facility, in Ink, Arkansas.

3. Defendant ALBERT S. GOODNER, JUNIOR a/k/a "JUNIOR" GOODNER, a person in charge of the

Ink, Arkansas facility and having knowledge of the aforementioned release of hazardous substances into the environment without a permit, failed to notify the appropriate agency of the United States Government of such release of hazardous substances; in violation of Title 42, United States Code, Section 9603(b).

COUNT NINE

1. Paragraphs one and two of Count One of the Indictment herein are hereby realleged and incorporated as though fully set forth herein.

2. From on or about August 1, 1985, and continuing to on or about May 5, 1989, at Mena, Arkansas, within the Western District of Arkansas, GOODNER AIRCRAFT, and ALBERT S. GOODNER, a/k/a/ "JUNIOR" GOODNER, defendants herein, did knowingly generate, store, treat, transport, dispose or otherwise handle hazardous wastes and did knowingly fail to file an application required to be filed for purposes of compliance with regulations promulgated by the Administrator of the Environmental Protection Agency and by the State of Arkansas; to wit: a Hazardous Waste Permit Application (EPA Form 3510-3); all in violation of Title 42, United States Code, Section 6928(d)(4).

A True Bill.

J. Michael Fitzhugh
United States Attorney

/s/ Deputy Christopher C. Sugg
Foreperson

By: /s/
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UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF ARKANSAS

UNITED STATES OF AMERICA
V. JUDGMENT IN A CRIMINAL CASE
GOODNER BROTHERS
AIRCRAFT, INC.
P. O. Box 1387
Mena, AR 71953 Case Number: 90-20031-01

(Name and Address of Defendant) Danny Thrailkill
Attorney for Defendant

THE DEFENDANT ENTERED A PLEA OF:

[_ guilty _ nolo contendere] as to count(s) _____, and

_ not guilty as to count(s) _____.

THERE WAS A:
[_ finding X verdict] of guilty as to count(s) 1, 2, 3, 4 and 9 .

THERE WAS A:
[_ finding _ verdict] of not guilty as to count(s) _____.

_ judgment of acquittal as to count(s) _____.

_ The defendant is acquitted and discharged as to this/ these count(s).

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF: Counts 1, 2, 3, and 4 – Disposal of Hazardous Waste without having obtained a permit pursuant to 42 U.S.C. 6925 and 6926, in violation of 18 U.S.C. 2 and 42 U.S.C. 6928(d)(2)(A). Count 9 – Handling Hazardous Waste and

Failing to file an Application for a Hazardous Waste Permit, in violation of 42 U.S.C. 6928(d)(4).

IT IS THE JUDGMENT OF THIS COURT THAT: The defendant is hereby placed on probation for a term of FIVE (5) YEARS and fined $150,000. This term consists of terms of five years on each of Counts 1, 2, 3, 4 and 9 with said terms to run concurrently.

In addition to any conditions of probation imposed above, IT IS ORDERED that the conditions of probation set out on the reverse of this judgment are imposed.

CONDITIONS OF PROBATION

Where probation has been ordered the defendant shall:

(1) refrain from violation of any law (federal, state, and local) and get in touch immediately with your probation officer if arrested or questioned by a law enforcement officer;

(2) associate only with law abiding persons and maintain reasonable hours;

(3) work regularly at a lawful occupation and support your legal dependents, If any, to the best of your ability. (When out of work notify your probation officer at once, and consult him prior to job changes);

(4) not leave the judicial district without permission of the probation officer;

(5) notify your probation officer immediately of any changes in your place of residence;

(6) follow the probation officer's instructions and report as directed.

The court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of 5 years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

IT IS FURTHER ORDERED that the defendant shall pay a total special assessment of $ 250.00 pursuant to Title 18, U.S.C. Section 3013 for count(s) 1, 2, 3, 4 and 9 as follows:

IT IS FURTHER ORDERED THAT counts _____ are DISMISSED on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall pay to the United States attorney for this district any amount imposed as a fine, restitution or special assessment. The defendant shall pay to the clerk of the court any amount imposed as a cost of prosecution. Until all fines, restitution, special assessments and costs are fully paid, the defendant shall immediately notify the United States attorney for this district of any change in name and address.

IT IS FURTHER ORDERED that the clerk of the court deliver a certified copy of this judgment to the United States marshal of this district.

_ The Court orders commitment to the custody of the Attorney General and recommends:

June 19, 1991
Date of Imposition of Sentence

/s/ H. Franklin Waters
Signature of Judicial Officer

H. Franklin Waters
Chief United States District Judge
Name and Title of Judicial Officer

_____
Date

RETURN

I have executed this Judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at
Date

___, the institution designated by the Attorney General, with a certified copy of this Judgment in a Criminal Case.

_____
United States Marshal

By _____
Deputy Marshal

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF ARKANSAS

UNITED STATES OF AMERICA

V. JUDGMENT IN A CRIMINAL CASE (For Offenses Committed On or After November 1, 1987)

ALBERT S. GOODNER, JR. Case Number: 90-20031-04

(Name of Defendant) Jerry McCombs
Defendant's Attorney

THE DEFENDANT:

_ pleaded guilty to count(s) _____

X was found guilty on count(s) 6, 7, 8 and 9 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
42 USC 9603(b)	Releasing Hazardous Substance into the Environment without a Permit.	August 1988	6

42 USC 9603(b)	Releasing Hazardous Substance into the Environment without a Permit.	November 1988	7
42 USC 9603(b)	Releasing Hazardous Substance into the Environment without a Permit.	March 14, 1989	8
42 USC 6928(d)(4)	Handling Hazardous Wastes and Failing to file an Application for a Hazardous Waste Permit.	May 5, 1989	9

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

X The defendant has been found not guilty on count(s) 1, 2, 3, 4, and 5 and is discharged as to such count(s).

_ Count(s) __ (is)(are) dismissed on the motion of the United States

X It is ordered that the defendant shall pay a special assessment of $ 200.00 , for count(s) 6, 7, 8 and 9 , which shall be due X immediately _ as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 432-46-9950

Defendant's Date of Birth: 09-23-30

Defendant's Mailing Address:

P. O. Box 1387
Mena, AR 71953

June 19, 1991
Date of Imposition of Sentence

/s/ H. Franklin Waters
Signature of Judicial Officer

H. Franklin Waters
Chief United States District Judge
Name & Title of Judicial Officer

June 21, 1991
Date

Defendant's Residence Address:

Route 1, Box 8013C

Mena, AR 71953

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned to a term of fifteen (15) months

_ The court makes the following recommendations to the Bureau of Prisons:

_ The defendant is remanded to the custody of the United States marshal.

_ The defendant shall surrender to the United States marshal for this district.

_ at ___ a.m. / p.m. on ___.

_ as notified by the United States marshal.

X The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

X before 2 p.m. on ___.

X as notified by the United States marshal.

_ as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ a _____, with a certified copy of this judgment

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of ___ one (1) year.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

X The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

_ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

X The defendant shall not possess a firearm or destructive device.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

FINE

The defendant shall pay a fine of $ 7,500.00. The fine includes any costs of incarceration and or supervision.

_ This amount is the total of the fines imposed on individual counts, as follows:

_ The court has determined that the defendant does not have the ability to pay interest. It is ordered that;

_ The interest requirement is waived.

_ The interest requirement is modified as follows:

This fine plus any interest required shall be paid:

_ in full immediately.

_ in full not later than _____.

_ in equal monthly installments over a period of ___ months. The first payment is due on the date of this judgment. Subsequent payments are due monthly thereafter.

_ in installments according to the following schedule of payments:

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

STATEMENT OF REASONS

_ The court adopts the factual findings and guideline application in the presentence report.

OR

X The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary): The court did not feel the defendant was entitled to a 4 level increase pursuant to 2Q1.2(b)(3).

Guideline Range Determined by the Court:

Total Offense Level: 14

Criminal History Category: I

Imprisonment Range: 15 to 21 months

Supervised Release Range: 0 to 1 years

Fine Range: $ 4,000 to $ 40,000

_ Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: $ 0

_ Full restitution is not ordered for the following reason(s):

X The sentence is within the guideline range, that range does not exceed 24 months, [illegible]

[illegible]

OR

_ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range

_ upon motion of the government, as a result of defendant's substantial assistance.

X for the following reason(s): Two level reduction pursuant to Section 2Q1.2 Application Notes #5 and a two level reduction pursuant to 2Q1.2 Application Note #8.

United States Court of Appeals
for the Eighth Circuit

No. 92-2466

United States of America, Appellee, v. Goodner Brothers Aircraft, Incorporated; and Albert S. Goodner, Jr., also known as Junior Goodner, Appellants.	* * * * * * * * * * * *	Appeal from the United States District Court for the Western District of Arkansas.

Submitted: December 11, 1991

Filed: June 4, 1992

Before LAY,* Chief Judge, WOLLMAN and HANSEN, Circuit Judges.

HANSEN, Circuit Judge.

Appellants Goodner Brothers Aircraft and Albert S. Goodner, Jr. (Junior Goodner) were charged with criminal violations of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6921 et seq., and the Comprehensive Environmental Response Compensation and Liability

*The Honorable Donald P. Lay was Chief Judge of the United States Court of Appeals for the Eighth Circuit at the time this case was submitted and took senior status on January 7, 1992, before the opinion was filed.

Act (CERCLA), 42 U.S.C. § 9601 et seq. This case has been tried twice. The first trial resulted in a hung jury on nine counts and acquittals on approximately four other counts. In the second trial on the remaining nine counts, the jury returned a guilty verdict against the appellants on most counts. Appellants appeal from their convictions in the district court. We affirm in part, reverse in part, and remand.

I. Background

Goodner Brothers Aircraft, of which Junior Goodner was the owner and operator, was in the business of repainting aircraft. Paint was removed from the aircraft by spraying undiluted paint removers onto the plane. The paint removers used were PR 3500 and PR 3700, purchased from El Dorado Chemical Company. These solvents consisted of 50% to 70% methylene chloride and a lesser amount of phenol. The paint remover would cause the paint on the plane to bubble up and slide off the plane. Water under high pressure was also applied to the plane to help peel off the paint. When the collected paint waste filled fifteen to twenty barrels, the waste was disposed of at the Goodner Brothers Farm. The waste was placed in three pits at the farm: two natural ravines and one man-made excavation. The evidence indicated that the total amount of waste so deposited was approximately 51,000 pounds or 25 tons.

In 1988, a neighbor noticed "two men dumping creamy beige, toxic-smelling waste into a ravine" on the Goodner Brothers Farm. Junior Goodner assured the neighbor that he knew about the situation and that he

should not be concerned. The neighbor reported the dumping to the authorities. The Arkansas Department of Pollution Control and Ecology and later the United States Environmental Protection Agency (EPA) began to investigate. Pursuant to a search warrant, the EPA seized documents at the Goodner Brothers Aircraft facility. The documents included a 1980 letter from the EPA and a 1982 letter from the Arkansas Department of Pollution Control and Ecology, both sent to Goodner Brothers Aircraft warning it of its potential liability for hazardous substances. Also pursuant to the warrant, the EPA took samples of the material coming off the plane and the substance found in the dumpsites. Upon testing, the samples from the dumpsites were found to contain up to 20% phenol and, in several cases, up to 20% methylene chloride.

Goodner Brothers Aircraft was convicted of counts 1 through 4, and Junior Goodner was found not guilty of counts 1 through 5. Counts 1 through 4 charge RCRA violations, the disposal of hazardous waste on certain dates without having obtained a permit pursuant to 42 U.S.C. §§ 6925 and 6926, in violation of 42 U.S.C. § 6928(d)(2)(A). Count 5 is not at issue. Both Goodner Brothers Aircraft and Junior Goodner were convicted of count 9, a RCRA count involving the handling of hazardous waste and failing to file an application for a hazardous waste permit, in violation of 42 U.S.C. § 6928(d)(4). Junior Goodner was convicted of counts 6 through 8 as well. These counts charge CERCLA violations involving the release of hazardous substances into the environment on certain dates without a permit, in violation of 42 U.S.C. § 9603(b). The district court sentenced Goodner

Brothers Aircraft to five years probation, a $150,000 fine, and a $250 special assessment. The district court denied Junior Goodner a reduction adjustment for acceptance of responsibility and sentenced him to fifteen months imprisonment, a $7,500 fine, and a $200 special assessment.

Appellants raise numerous issues regarding the RCRA counts (counts 1 through 4 and 9) and the CERCLA counts (counts 6 through 8). Junior Goodner also challenges the district court's refusal to grant him an offense level reduction at sentencing for acceptance of responsibility.

II. Discussion

A. RCRA Counts 1 through 4

Counts 1 through 4, of which Goodner Brothers Aircraft was convicted, involve violations of 42 U.S.C. § 6928(d)(2)(A). This subsection provides criminal penalties for "[a]ny person who . . . knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subchapter [RCRA] . . . without a permit under this subchapter [RCRA]. . . . " Jury instruction number 9 stated that the third element necessary to prove the RCRA violations charged in counts 1 through 4 was "that the wastes were listed or identified by the Environmental Protection Agency as hazardous waste pursuant to [RCRA]." This instruction was clarified in jury instruction number 11.

INSTRUCTION NO. 11

HAZARDOUS WASTE LISTING

You are instructed that the Environmental Protection Agency has listed as hazardous the following wastes:

> The spent halogenated solvent, methylene chloride, and all spent solvent mixtures and/or blends containing, before their use, a total of ten percent or more by volume of methylene chloride.

You are further instructed that pursuant to the regulations of the Environmental Protection Agency and the Arkansas Department of Pollution Control and Ecology, when a listed hazardous waste is mixed with a solid, liquid, or semisolid material, the resulting mixtures is also a hazardous waste.

A jury is presumed to follow the instructions given to it by the court. *Greer v. Miller*, 483 U.S. 756, 766 n.8 (1987). Under this instruction, the jury could have determined that the waste was hazardous under two alternative grounds. First, the jury could have found that the waste was a listed waste under the quoted language from 40 C.F.R. § 261.31. *See* 42 U.S.C. § 6921(b). This type of listed hazardous waste is referred to as F002 waste. Second, the jury could have found the waste to be "hazardous waste" pursuant to the mixture rule set forth in the last paragraph of the instruction.

The mixture rule was promulgated by the EPA, codified at 40 C.F.R. § 261.3(a)(2)(iv), and incorporated by reference under the Arkansas regulations, 2 Ark. Admin. Code § 2(5). Recently, the mixture rule was successfully

challenged on procedural grounds by other parties in *Shell Oil Company v. Environmental Protection Agency*, 950 F.2d 741 (D.C. Cir. 1991). Because the EPA failed to follow the proper notice and comment procedures required under the Administrative Procedures Act, the court vacated the mixture rule. *Id.* at 752.

When a jury verdict may be supportable on one ground but also may be based on another ground that is unconstitutional or illegal, and when it is impossible to tell which ground the jury selected, then the verdict must be set aside. *Griffin v. United States*, 112 S. Ct. 466, 474 (1991); *Yates v. United States*, 354 U.S. 298, 312 (1957). From the jury's general verdict in this case, it is impossible to determine whether the jury found the waste to be a listed F002 waste or whether it relied upon the invalidated mixture rule.

To avoid the reversal of the convictions under counts 1 through 4, the government first argues that the invalidation of the rule does not apply retroactively. A regulation not promulgated pursuant to the proper notice and comment procedures has no "force or effect of law" and therefore is void ab initio. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 313 (1979). "Yet, when equity demands, an unlawfully promulgated regulation can be left in place while the agency provides the proper procedural remedy." *Fertilizer Inst. v. E.P.A.*, 935 F.2d 1303, 1312 (D.C. Cir. 1991) (citations omitted). The *Shell Oil* court "vacated" and "set aside" the mixture rule. 950 F.2d at 752. The government argues, however, that under the same authority the court had to leave the rule in place, it chose to invalidate the rule only prospectively. Based upon the language in *Shell Oil* that the EPA may wish to reenact the

mixture rule on an interim basis pending full notice and comment to avoid "*discontinuity* in the regulation of hazardous wastes," the government asserts that the court must have intended only prospective invalidation because discontinuity would not exist if the rule was void ab initio. 950 F.2d at 752 (emphasis added). We reject the government's interpretation because it is inconsistent with the language in *Shell Oil* that specifically pronounces that the rule is "vacated" and "set aside."[1] The District of Columbia Circuit has previously noted in another case that "[t]o 'vacate,' as the parties should well know, means 'to annul; to cancel or rescind; to declare, to make, or to render, void; to defeat; to deprive of force; to make of no authority or validity; to set aside.' " *Action on Smoking & Health v. C.A.B.*, 713 F.2d 795, 797 (D.C. Cir. 1983) (citations omitted). In addition, the language regarding "discontinuity" could easily refer to the practical effect of invalidation of the mixture with respect to the compliance practices of the regulated industries rather than referring to the legal force of the mixture rule.

The government argues that under the test in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), the invalidation should only apply prospectively. Retroactive application of the decision in *Shell Oil*, however, is "consistent with the Supreme Court's recent decision in *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439, 2445-46 (1991), in

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[1] Subsequent to filing its opinion, the court summarily denied the government's request to "clarify" that the opinion only voided the mixture rule prospectively. *Shell Oil Co. v. E.P.A.*, No. 80-1532, et al. (D.C. Cir. March 5, 1992) (order denying motion for clarification).

which the Court announced that full retroactivity is the normal rule in civil cases and limited the applicability of *Chevron Oil*['s] . . . test for prospectivity." *Bottineau Farmers Elevator v. Woodward-Clyde Consultants*, No. 90-5151, slip op. at 20 (8th Cir. May 5, 1992). Under *James B. Beam Distilling*, full retroactive effect must be given to a new rule of civil law when the new rule is applied to the litigants in the case in which the rule was announced. *Boudreau v. Deloitte, Haskins & Sells*, 942 F.2d 497, 498 n.1 (8th Cir. 1991). The court in *Shell Oil* did not expressly reserve the question of retroactivity or of whether its holding should apply to the parties before it. On the contrary, it declined to reach the substantive arguments of the petitioner regarding the mixture rule because it had vacated the mixture rule. 950 F.2d at 952. If the court had not applied the invalidation of the mixture rule to the parties before it, it would have been required to reach the substantive arguments. Under *James B. Beam Distilling* and consistent with the meaning of the word "vacate," we find that invalidation of the mixture rule applies retroactively.

The second argument raised by the government to avoid reversal on counts 1 through 4 is that the Arkansas mixture rule could be relied upon in place of the vacated federal one. Goodner Brothers Aircraft was convicted of a federal statute, 42 U.S.C. § 6928(d)(2)(A), which is defined by federal law. The federal law did not incorporate state law definitions of hazardous waste. *See* 42 U.S.C. §§ 6903(5), 6921(b). We find any reliance on the state mixture rule in this case inappropriate.

Based upon the invalidation of the federal mixture rule, we reverse the district court and remand so that the

verdicts on counts 1, 2, 3, and 4 may be set aside and a new trial held. Consequently, we need not address the numerous other issues raised by Goodner Brothers Aircraft with respect to counts 1 through 4.

B. RCRA Count 9

Both Goodner Brothers Aircraft and Junior Goodner were convicted of count 9 involving the handling of hazardous waste and failure to file an application for a hazardous waste permit under RCRA, in violation of 42 U.S.C. § 6928(d)(4). This subsection provides criminal liability for any person who knowingly generates, disposes of, or otherwise handles any hazardous waste and who knowingly fails to file "any record, application, manifest, report, or other document required to be maintained or filed" under RCRA. 42 U.S.C. § 6928(d)(4).

Jury instruction number 20 properly includes as the third element that "the wastes were listed or identified by the Environmental Protection Agency as a hazardous waste pursuant to [RCRA]." No separate definition of hazardous waste was given for this count. Because the third element in this RCRA count is identical to that given for RCRA counts 1 through 4, the definition for all of the counts presumably is the one given in jury instruction number 11. Therefore, we must reverse and remand for retrial with respect to RCRA count 9 for the same reasons as given for the reversal and remand of RCRA counts 1 through 4. Consequently, we need not reach the additional arguments raised by the appellants with respect to this count.

C. CERCLA Counts 6 through 8

Counts 6 through 8, of which only Junior Goodner was convicted, involve the release of hazardous substances into the environment on certain dates with a permit in violation of 42 U.S.C. § 9603(b). Jury instruction number 16 properly identified as an element of the CERCLA counts "that the defendant knew of the release into the environment from the facility of a hazardous substance in an amount in excess of the reportable quantity." Instruction 17 defined "hazardous substances" under CERCLA.

INSTRUCTION NUMBER 17

CERCLA – DEFINITIONS

. . . .

> The term "hazardous substance" is defined to include any hazardous waste listed under [RCRA]. Therefore, because it is listed as an F002 hazardous waste, the spent solvent methylene chloride, and spent solvents which contained more than ten percent methylene chloride before use are hazardous substances.

Appellants argue that this CERCLA instruction also references back to instruction 11, which defined hazardous waste under RCRA and which stated both that the waste may be a listed F002 hazardous waste and that the waste may be hazardous waste under the invalidated mixture rule. This CERCLA instruction defining hazardous substances, however, does more than refer back to the hazardous waste definition. It specifically identified the waste as a listed F002 hazardous waste and, consequently,

eliminated any need for the jury to rely upon the mixture rule. We find that the invalidation of the mixture rule does not affect the convictions under CERCLA counts 6 through 8. With respect to these counts, therefore, appellant's other arguments must be addressed.

Junior Goodner argues that the paint waste was not a listed F002 hazardous waste within the definition in 40 C.F.R. § 261.31. The paint remover clearly falls within the definition of F002 waste because, before use, it was a solvent that contained 50% to 70% methylene chloride. Even some samples of the paint waste, containing the solvent after use, were found to have over the required 10% methylene chloride. Junior Goodner, however, distinguishes the paint remover from the paint waste and argues that the paint waste is not a "spent solvent." In promulgating the rule listing certain spent solvents as F002 hazardous waste, the EPA noted that:

> the spent solvent listings cover only those solvents that are used for their "solvent" properties – that is, to solubilize (dissolve) or mobilize other constituents. . . . A solvent is considered "spent" when it has been used and is no longer fit for use without being regenerated, reclaimed, or otherwise reprocessed. On the other hand, process wastes where solvents were used as reactants or ingredients in the formulation of commercial chemical products are not covered by the listing.

50 Fed. Reg. 53,315, 53,316 (1985). The paint waste contains paint remover that was used for its solvent properties and was not used for the formulation of a commercial product. It is considered "spent" because it cannot be reused unless it is reprocessed. Therefore, the paint

remover in the paint waste is a spent solvent within the meaning of 40 C.F.R. § 261.31.

Junior Goodner next argues that insufficient proof existed to support a finding that he knowingly failed to notify authorities of a "release" from a "facility" into the "environment" within the meaning of the statute. The definition of environment includes "land surface . . . or ambient air." 42 U.S.C. §-9601(8). The definition of release includes any "dumping or disposing" into the environment. 42 U.S.C. § 9601(22). The definition of facility includes "storage containers." 42 U.S.C. § 9601(9). Under the plain language of the statute, the uncontroverted evidence that the paint waste was dumped from the barrels onto the land falls within the statutory language.

Junior Goodner also argues that the jury instructions were faulty because they did not specify that the release of a reportable quantity of a hazardous substance must occur within a 24-hour period and that the indictment also suffered the same defect. The limitation that the release of a reportable quantity occurred in a 24-hour period is not within the language of the statute, 42 U.S.C. § 9603(b), but is contained in an interpretative regulation, 40 C.F.R. § 302.6(a). If only the statutory language and not the regulatory language is included, the indictment is permissible, as long as the essential elements of the crime are set forth. *United States v. Crow*, 824 F.2d 761, 762 (9th Cir. 1987). Even if the regulation narrowed the scope of the statute in this case, it was harmless error because the uncontroverted evidence demonstrated that a reportable quantity of the paint waste was dumped onto the Goodner Brothers Farm in an amount of time less than 24 hours.

The final argument Junior Goodner raises with respect to the CERCLA counts is that the indictment was fatally flawed because it did not contain the term "facility." This contention has little merit because the definition of facility includes storage containers, and the barrels from which the paint waste was dumped constitute storage containers. Furthermore, the jury instructions included the term "facility" in defining the elements of the offense.

D. Acceptance of Responsibility

Junior Goodner contends that the district court erred in sentencing by refusing to reduce his offense level by two levels for acceptance of responsibility. This court gives great deference to the district court on review of this determination and will not reverse unless the district court's decision is without foundation. *United States v. Evidente*, 894 F.2d 1000, 1002 (8th Cir.), *cert. denied*, 495 U.S. 922 (1990). The district court did not abuse its discretion in refusing to grant Junior Goodner a reduction for acceptance of responsibility.

E. Motion to Strike

Taken with the merits of this case, we consider the government's motion to strike various letters from the EPA that appellants included in their appendix. These letters are non-binding legal reference materials that were not relied upon by this court in the case. Therefore, we deny the government's motion to strike.

III. Conclusion

We reverse the district court on counts 1 through 4 against Goodner Brothers Aircraft and on count 9 against both Goodner Brothers Aircraft and Junior Goodner and remand these counts for a new trial. We affirm the district court with respect to counts 6 through 8 against Junior Goodner. In addition, we deny the government's motion to strike.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 91-2466WAFS

United States of America, Appellee,	*	Appeal from the United States District Court for the Western District of Arkansas
v.	*	
Goodner Brothers Aircraft, Inc., et al, Appellants,	*	

The petition for rehearing by the panel has been considered by the court and is hereby denied.

July 7, 1992

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

§ 6903. Definitions [RCRA § 1004]

(5) The term "hazardous waste" means a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may –

(A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or

(B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

§ 6921 Identification and listing of hazardous waste [RCRA § 3001]

(a) Criteria for identification or listing

Not later than eighteen months after October 21, 1976, the Administrator shall, after notice and opportunity for public hearing, and after consultation with appropriate Federal and State Agencies, develop and promulgate criteria for identifying the characteristics of hazardous waste, and for listing hazardous waste, which should be subject to the provisions of this subchapter, taking into account toxicity, persistence, and degradability in nature, potential for accumulation in tissue, and other related factors such as flammability, corrosiveness, and other hazardous characteristics. Such criteria shall be revised from time to time as may be appropriate.

(b) Identification and listing

(1) Not later than eighteen months after October 21, 1976, and after notice and opportunity for public hearing, the Administrator shall promulgate regulations identifying the characteristics of hazardous waste, and listing particular hazardous wastes (within the meaning of Section 6903(5) of this title), which shall be subject to the provisions of this subchapter. Such regulations shall be based on the criteria promulgated under subsection (a) of this section and shall be revised from time to time thereafter as may be appropriate. The Administrator, in cooperation with the Agency for Toxic Substances and Disease Registry and the National Toxicology Program, shall also identify or list those hazardous wastes which shall be subject to the provisions of this subchapter solely because

of the presence in such wastes of certain constituents (such as identified carcinogens, mutagens, or teratagens) at levels in excess of levels which endanger human health.

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§ 9601. Definitions [CERCLA § 101]

(8) The term "environment" means (A) the navigable waters, the waters of the contiguous zone, and the ocean waters for which the natural resources are under the exclusive management authority of the United States under the Magnuson Fishery Conservation and Management Act [16 U.S.C.A. § 1801 et seq.], and (B) any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the United States or under the jurisdiction of the United States.

(9) The term "facility" means (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed or, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

(22) The term "release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant), but excludes (A) any release which results in exposure to persons solely within a workplace, with respect to a claim which such persons may assert against the employer of such persons, (B) emissions from the

engine exhaust of a motor vehicle, rolling stock, aircraft, vessel, or pipeline pumping station engine, (C) release of source, establishing reportable quantities not later than December 31, 1986. For all hazardous substances for which proposed regulations establishing reportable quantities were not published in the Federal Register under this subsection on or before March 1, 1986, the Administrator shall publish under this subsection proposed regulations establishing reportable quantities not later than December 31, 1986, and promulgate final regulations under this subsection establishing reportable quantities not later than April 30, 1988.

§ 9603 Notification requirements respecting released substances [CERCLA § 103]

(a) Notice to National Response Center upon release from vessel or offshore or onshore facility by person in charge; conveyance of notice by Center

Any person in charge of a vessel or an offshore or an onshore facility shall, as soon as he has knowledge of any release (other than a federally permitted release) of a hazardous substance from such vessel or facility in quantities equal to or greater than those determined pursuant to section 9602 of this title, immediately notify the National Response Center established under the Clean Water Act [33 U.S.C.A. § 1251 et seq.] of such release. The National Response Center shall convey the notification expeditiously to all appropriate Government agencies, including the Governor of any affected State.

(b) Penalties for failure to notify; use of notice or information pursuant to notice in criminal case

Any person –

(1) in charge of a vessel from which a hazardous substance is released, other than a federally permitted release, into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, or

(2) in charge of a vessel from which a hazardous substance is released, other than a federally permitted release, which may affect natural resources belong to, appertaining to, or under the exclusive management authority of the United States (including resources under the Magnuson Fishery Conservation and Management

Act [16 U.S.C.A. § 1801 et seq.]), and who is otherwise subject to the jurisdiction of the United States at the time of the release.

40 C.F.R. § 260.10 Definitions

Disposal means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or ~~haz~~ardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

40 C.F.R. § 261.2 Definition of solid waste.

(a)(1) A *solid waste* is any discarded material that is not excluded by § 261.4(a) or that is not excluded by variance granted under §§ 260.30 and 260.31.

(2) A *discarded material* is any material which is:

(i) *Abandoned,* as explained in paragraph (b) of this section; or

(ii) *Recycled,* as explained in paragraph (c) of this section; or

(iii) Considered *inherently waste-like,* as explained in paragraph (d) of this section.

(b) Materials are solid waste if they are *abandoned* by being:

(1) Disposed of; or

(2) Burned or incinerated; or

(3) Accumulated, stored, or treated (but not recycled) before or in lieu of being abandoned by being disposed or, burned, or incinerated.

40 C.F.R. § 261.3 Definition of hazardous waste.

(a) A solid waste, as defined in § 261.2, is a hazardous waste if:

(1) It is not excluded from regulation as a hazardous waste under § 261.4(b); and

(2) It meets any of the following criteria:

(i) It exhibits any of the characteristics of hazardous waste identified in subpart C except that any mixture of a waste from the extraction, beneficiation, and processing of ores and minerals excluded under § 261.4(b)(7) and any other solid waste exhibiting a characteristic of hazardous waste under subpart C of this part only if it exhibits a characteristic that would not have been exhibited by the excluded waste alone if such mixture had not occurred or if it continues to exhibit any of the characteristics exhibited by the non-excluded wastes prior to mixture. Further, for the purposes of applying the Extraction Procedure Toxicity characteristic to such mixtures, the mixture is also a hazardous waste if it exceeds the maximum concentration for any contaminant listed in table I to § 261.24 that would not have been exceeded by the excluded waste alone if the mixture had not occurred or if it continues to exceed the maximum concentration for any contaminant exceeded by the nonexempt waste prior to mixture.

(ii) It is listed in subpart D and has not been excluded from the lists in subpart D under §§ 260.20 and 260.22 of this chapter.

(iii) It is a mixture of a solid waste and a hazardous waste that is listed in subpart D of this part solely

because it exhibits one or more of the characteristics of hazardous waste identified in subpart C, unless the resultant mixture no longer exhibits any characteristic of hazardous waste identified in subpart C of this part or unless the solid waste is excluded from regulation under § 261.4(b)(7) and the resultant mixture no longer exhibits any characteristic of hazardous waste identified in subpart C of this part for which the hazardous waste listed in subpart D of this part was listed.

(iv) It is a mixture of solid waste and one or more hazardous wastes listed in subpart D and has not been excluded from this paragraph under §§ 260.20 and 260.22 of this chapter; however, the following mixtures of solid wastes and hazardous wastes listed in subpart D are not hazardous wastes (except by application of paragraph (a)(2) (i) or (ii) of this section) if the generator can demonstrate that the mixture consists of wastewater the discharge of which is subject to regulation under either section 402 or section 307(b) of the Clean Water Act (including wastewater at facilities which have eliminated the discharge of wastewater), and:

(A) One or more of the following spent solvents listed in § 261.31-carbon tetrachloride, tetrachloroethylene, trichlorethylene-*Provided*, That the maximum total weekly usage of these solvents (other than the amounts that can be demonstrated not to be discharged to wastewater) divided by the average weekly flow of wastewater into the headworks of the facility's wastewater treatment or pre-treatment system does not exceed 1 part per million; or

(B) One or more of the following spent solvents listed in § 261.31-methylene chloride, 1,1,1-trichloroethane, chlorobenzene, o-dichlorobenzene, cresols, cresylic acid, nitrobenzene, toluene, methyl ethyl ketone, carbon disulfide, isobutanol, pyridine, spent chlorofluorocarbon solvents-provided that the maximum total weekly usage of these solvents (other than the amounts that can be demonstrated not to be discharged to wastewater) divided by the average weekly flow of wastewater into the headworks of the facility's wastewater treatment or pre-treatment system does not exceed 25 parts per million; or

(C) One of the following wastes listed in § 261.32 – heat exchanger bundle cleaning sludge from the petroleum refining industry (EPA Hazardous Waste No. K050); or

(D) A discarded commercial chemical product, or chemical intermediate listed in § 261.33, arising from *de minimis* losses of these materials from manufacturing operations in which these materials are used as raw materials or are produced in the manufacturing process. For purposes of this subparagraph, *"de minimis"* losses include those from normal material handling operations (e.g. spills from the unloading or transfer of materials from bins or other containers, leaks from pipes, valves or other devices used to transfer materials); minor leaks of process equipment, storage tanks or containers; leaks from well-maintained pump packings and seals; sample purgings; relief device discharges; discharges from safety showers and rinsing and cleaning of personal safety equipment; and rinsate from empty containers or from containers that are rendered empty by that rinsing; or

(E) Wastewater resulting from laboratory operations containing toxic (T) wastes listed in subpart D, *Provided, That* the annualized average flow of laboratory wastewater does not exceed one percent of total wastewater flow into the headworks of the facility's wastewater treatment or pre-treatment system, or provided the wastes, combined annualized average concentration does not exceed one part per million in the headworks of the facility's wastewater treatment or pretreatment facility. Toxic (T) wastes used in laboratories that are demonstrated not to be discharged to wastewater are not to be included in this calculation.

(b) A solid waste which is not excluded from regulation under paragraph (a)(1) of this section becomes a hazardous waste when any of the following events occur:

(1) In the case of a waste listed in subpart D, when the waste first meets the listing description set forth in subpart D.

(2) In the case of a mixture of solid waste and one or more listed hazardous wastes, when a hazardous waste listed in subpart D is first added to the solid waste.

(3) In the case of any other waste (including a waste mixture), when the waste exhibits any part of the characteristics identified in subpart C.

(c) Unless and until it meets the criteria of paragraph (d):

(1) A hazardous waste will remain a hazardous waste.

(2)(i) Except as otherwise provided in paragraph (c)(2)(ii) of this section, any solid waste generated from

the treatment, storage, or disposal of a hazardous waste, including any sludge, spill residue, ash, emission control dust, or leachate (but not including precipitation run-off) is a hazardous waste. (However, materials that are reclaimed from solid wastes and that are used beneficially are not solid wastes and hence are not hazardous wastes under this provision unless the reclaimed material is burned for energy recovery or used in a manner constituting disposal.)

(ii) The following solid wastes are not hazardous even though they are generated from the treatment, storage, or disposal of a hazardous waste, unless they exhibit one or more of the characteristics of hazardous waste:

(A) Waste pickle liquor sludge generated by lime stabilization of spent pickle liquor from the iron and steel industry (SIC Codes 331 and 332).

(B) Waste from burning any of the materials exempted from regulation by § 261.6(a)(3)(v) through (viii).

(d) Any solid waste described in paragraph (c) of this section is not a hazardous waste if it meets the following criteria:

(1) In the case of any solid waste, it does not exhibit any of the characteristics of hazardous waste identified in subpart C. (However, wastes that exhibit a characteristic at the point of generation may still be subject to the requirements of part 268, even if they no longer exhibit a characteristic at the point of land disposal.)

(2) In the case of a waste which is listed waste under subpart D, contains a waste listed under subpart D

or is derived from a waste listed in subpart D, it also has been excluded from paragraph (c) under §§ 260.20 and 260.22 of this chapter.

40 C.F.R. § 261.7 Residues of hazardous waste in empty containers.

(a)(1) Any hazardous waste remaining in either (i) an empty container or (ii) an inner liner removed from an empty container, as defined in paragraph (b) of this section, is not subject to regulation under parts 261 through 265, or part 268, 270 or 124 of this chapter or to the notification requirements of section 3010 of RCRA.

(2) Any hazardous waste in either (i) a container that is not empty or (ii) an inner liner removed from a container that is not empty, as defined in paragraph (b) of this section, is subject to regulation under parts 261 through 265, and parts 268, 270 and 124 of this chapter and to the notification requirements of section 3010 of RCRA.

(b)(1) A container or an inner liner removed from a container that has held any hazardous waste, except a waste that is a compressed gas or that is identified as an acute hazardous waste listed in §§ 261.31, 261.32, or 261.33(e) of this chapter is empty if:

(i) All wastes have been removed that can be removed using the practices commonly employed to remove materials from that type of container, *e.g.*, pouring, pumping, and aspirating, *and*

(ii) No more than 2.5 centimeters (one inch) of residue remain on the bottom of the container or inner liner, *or*

(iii)(A) No more than 3 percent by weight of the total capacity of the container remains in the container or

inner liner if the container is less than or equal to 110 gallons in size, or

(B) No more than 0.3 percent by weight of the total capacity of the container remains in the container or inner liner if the container is greater than 110 gallons in size.

(2) A container that has held a hazardous waste that is a compressed gas is empty when the pressure in the container approaches atmospheric.

(3) A container or inner liner removed from a container that has held an acute hazardous waste listed in §§ 261.31, 261.32, or 261.33(e) is empty if:

(i) The container or inner liner has been triple rinsed using a solvent capable of removing the commercial chemical product or manufacturing chemical intermediate;

(ii) The container or inner liner has been cleaned by another method that has been shown in the scientific literature, or by tests conducted by the generator, to achieve equivalent removal; or

(iii) In the case of a container, the inner liner that prevented contact of the commercial chemical product or manufacturing chemical intermediate with the container, has been removed.

40 C.F.R. § 261.31 Hazardous wastes from non-specific sources.

(a) The following solid wastes are listed hazardous wastes from non-specific sources unless they are excluded under §§ 260.20 and 260.22 and listed in appendix IX.

Industry and EPA hazardous waste No.	Hazardous waste	Hazard code
F002	The following spent halogenated solvents: Tetrachloroethylene, methylene chloride, trichloroethylene, 1,1,1-trichloroethane, chlorobenzene, 1,1,2-trichloro-1,2,2-trifluoroethane, ortho-dichlorobenzene, trichlorofluoromethane, and 1,1,2-trichloroethane; all spent solvent mixtures/blends containing, before use, a total of ten percent or more (by volume) of one or more of the above halogenated solvents or those listed in F001, F004, or F005; and still bottoms from the recovery of these spent solvents and spent solvent mixtures.	(T)

OSWER DIRECTIVE

DIRECTIVE NUMBER: 9444.15.(85)

TITLE: Regulatory Status of Nalcast 6015/Water/Wax Mixture

APPROVAL DATE: 6-24-85

EFFECTIVE DATE: 6-24-85

ORIGINATING OFFICE: Office of Solid Waste

Key Words:	Solvents, Listed Waste
Regulations:	40 CFR 2613(a)(2)(iii)
Subject:	Regulatory Status of Nalcast 6015/Water/Wax Mixture
Addressee:	Martin H. Lewis, Smith & Schnacke, Suite 2250, 40 S. High Street, Columbus, Ohio 43215-6199
Originator:	Eileen Claussen, Director, Characterization and Assessment Branch
Source Doc.:	#9444.22(85)
Date:	6-24-85

Summary:

The letter discusses the regulatory status of a spent solvent mixture (Nalcast 6015, water and wax) and residue from a water-wall paint spray booth in which solvent-based paints are sprayed. The letter states that regulations proposed on April 30, 1985,* will subject

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* The December 31, 1985, FR notice (Vol. 50, No. 251, p. 53315) finalizes the proposed regulations. Solvent mixtures are now regulated if they contain 10% or more of F001, F002, F004, or

Nalcast 6015 and other spent solvent mixtures containing more than 10 percent of one or more listed solvents to regulation as listed wastes. Solvent-based paints are not listed hazardous wastes, nor are they included under the spent solvent listings.

June 24, 1985

Mr. Martin H. Lewis
Smith & Schnacke
Suite 2250
41 S. High Street
Columbus, Ohio 43215-6199

Dear Mr. Lewis:

This letter responds to your inquiry of June 14, 1985, regarding the regulatory status of a solvent mixture (Nalcast 6015, water and wax) and residue from a water-wall paint spray booth in which solvent-based paints are sprayed.

First, you are incorrect in stating that Nalcast 6015 (used in the removal of wax) is considered a process waste when intended to be discarded. Since Nalcast 6015 is used as a "solvent" (*i.e.*, to clean wax from metal parts) it is considered "spent solvent" when it has served its intended purpose and can no longer be used without further processing. However, you are correct in stating

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F005. Mixtures containing F003 solvents are regulated if they contain only F003 solvents, or 10% of F001, F002, F004, or F005 and one or more of the F003 solvents.

that under the current hazardous waste regulations, spent solvent mixtures are not regulated, unless they exhibit one or more of the characteristics of hazardous waste (*i.e.*, ignitability, EP toxicity, reactivity, and corrosivity).

At this time, the spent solvent listings pertain only to the technical grade or the pure form of the solvent, thus, solvent mixtures remain unregulated. On April 30, 1985, the Agency proposed to close this regulatory loophole by expanding the universe of wastes considered "spent solvents" to include solvent mixtures containing ten percent or more of one or more listed solvents (see enclosed *Federal Register* notice). When this rule becomes final, Nalcast 6015, when spent or discarded, will be considered a listed hazardous waste. In addition the Nalcast 6015/water/wax mixture also will be considered hazardous waste based on the provision in the "mixture rule" (40 CFR 261.3(a)(2)(iii)) which states that a mixture of solid waste and hazardous waste is considered "hazardous waste."

With respect to the water-wall spray booth residue, those wastes are not hazardous waste unless they exhibit one or more of the characteristics of hazardous waste. As you correctly stated, solvent-based paints are not listed hazardous waste when discarded nor are they covered under the spent solvent listings. The listings do not apply to waste streams where solvents are a contaminant.

I trust that this letter adequately responds to the questions raised in your letter. Should you have

additional questions, please call Jacqueline Sales, of my staff, at (202) 382-4807.

Sincerely,

Eileen Claussen
Director
Characterization and
Assessment Branch

Enclosure

THE COURT: Thank you very much. Let me make a note to one of my staff, please.

Ladies and gentlemen of the jury, the Court will now read to you the instructions which contain the law that I ask that you use in deciding the case. I've already explained that to you. As I've also told you, these will be available – a set of them will be available in the jury room if you desire. You should, and there will be an instruction that says that, you should consider all of the instruction as a whole in deciding this case. If you do decide to look at the instructions, read them when you go back there, make sure that you read at least all the instructions having to do with a certain issue. And there are certain counts. You will hear that as you hear the instructions, but don't read one and exclude all the others when you might need to read several or look at several in order to get the true picture.

11.01 BEGINNING OF CHARGE – PROVINCE OF THE COURT

INSTRUCTION NO. 1

Now that you've heard the evidence –

THE COURT: Well, let me say this to you so it will – it might help a little bit for you to follow them. The first several you'll notice have to do with general duties of jurors. Those are important also. Toward the middle, you'll hear some instructions that have to do specifically with this case. That's a number of them. And towards the end, you'll have some other instructions that apply to duties of how you proceed, those kinds of things.

INSTRUCTION NO. 1

Now that you've heard the evidence and the argument, it becomes my duty to give you the instructions of the Court as to the law applicable to this case.

It is your duty as jurors to follow the law as stated in the instructions of the Court, and to apply the rules of law so given to the facts as you find them from the evidence in the case.

You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole.

Neither are you to be concerned with the wisdom of any rule of law stated by the Court. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the Court; just as it would be a violation of your sworn duty, as judges of the facts, to base a verdict on anything but the evidence in the case.

Justice through trial by jury must always depend upon the willingness of each individual juror to seek the truth as to the facts from the same evidence presented to all the jurors; and to arrive at a verdict by applying the same rules of law, as given in the instructions of the Court.

INSTRUCTION NO. 2
11.03 (PROVINCE OF THE JURY)

You have been chosen and sworn as jurors in this case to try the issues of fact presented by the allegations

of the indictment and the denial made by the "not guilty" plea of the accused. You are to perform this duty without bias or prejudice as to any party. The law does not permit jurors to be governed by sympathy, prejudice, or public opinion. Both the accused and the public expect that you will carefully and impartially consider all the evidence in the case, follow the law as stated by the Court, and reach a just verdict, regardless of the consequences.

INSTRUCTION NO. 3
11.14 (BURDEN OF PROOF-REASONABLE DOUBT)

The law presumes a defendant to be innocent of crime. Thus, a defendant, although accused, begins the trial with a "clean slate" – with no evidence against him. And the law permits nothing but legal evidence presented before the jury to be considered in support of any charge against the accused. So the presumption of innocence alone is sufficient to acquit a defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendants' guilt after careful and impartial consideration of all the evidence in the case.

It is not required that the Government prove guilt beyond all possible doubt. The test is one of reasonable doubt. A reasonable doubt is a doubt based upon reason and common sense – the kind of doubt that would make a person – a reasonable person hesitate to act. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his own affairs.

The jury will remember that a defendant is never to be convicted on mere suspicion or conjecture.

The burden is always upon the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to a defendant; for the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

So if the jury, after careful and impartial consideration of all the evidence in the case, has a reasonable doubt that a defendant is guilty of the charge, it must acquit. If the jury views the evidence in the case as reasonably permitting either of two conclusions – one of innocence, the other of guilt – the jury should of course adopt the conclusion of innocence.

INSTRUCTION NO. 4
13.02

An indictment is but a formal method of accusing a defendant of a crime. It is not evidence of any kind against the accused.

INSTRUCTION NO. 5
11.04 (CONSIDER ONLY OFFENSE CHARGED)

The defendant is not on trial for any act or conduct not alleged in the indictment.

INSTRUCTION NO. 6
13.05 ("ON OR ABOUT" – PROOF OF)

You will note the indictment charges that the offense was committed "on or about" a certain date. The proof

need not establish with certainty the exact date of the alleged offense. It is sufficient if the evidence in the case established beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged.

INSTRUCTION NO. 7
11.07

A separate crime or offense is charged in each count of the indictment. Each charge and the evidence pertaining to it should be considered separately. The fact that you may find the accused guilty or not guilty as to one of the offenses charged should not control your verdict as to any other offense charged.

You will be given a copy of the indictment which sets forth the specific charges against each defendant.

INSTRUCTION NO. 8
INSTRUCTIONS APPLY TO EACH DEFENDANT

Unless otherwise stated, the jury should consider each instruction given to apply separately and individually to each defendant on trial.

INSTRUCTION NO. 9
RESOURCE CONSERVATION AND RECOVERY ACT (DISPOSAL OF HAZARDOUS WASTE WITHOUT A PERMIT)

Counts one through four – and by the way, you just were told that you'll get a copy of the indictment where you can actually see the charges. Now I'm telling you counts one through four of the indictment charge the

defendants with a violation of the Resource Conservation and Recovery Act (called RCRA).

The Resource Conservation and Recovery Act makes it unlawful for any person to knowingly dispose of any hazardous waste identified or listed under the act without a permit. Under this act, the concentration of the wastes after disposal has no bearing of whether the disposal was lawful.

In order to find defendants guilty of the crimes charged in counts one through four of the indictment, you must find that the Government has proven beyond a reasonable doubt, with respect to each count and for each defendant charged, the following four elements:

> One, that on or about the dates alleged in the indictment the defendants knowingly disposed of or commanded or caused others to dispose of waste;
>
> Two, that defendants knew that the waste had the potential to be harmful to others or to the environment;
>
> Three, that the wastes were listed or identified by the Environmental Protection Agency as hazardous waste pursuant to the Resource Conservation and Recovery Act; and Four, that the defendants had not obtained from either the Environmental Protection Agency or the state of Arkansas a permit or interim status authorizing the disposal under the Resource Conservation and Recovery Act.

INSTRUCTION NO. 10
DEFINITION OF DISPOSAL

The term "disposal" is defined under the Resource Conservation and Recovery Act to mean the discharge, deposit, injection, dumping, spilling, leaking, or placing of any hazardous wastes into or on land or water so that the hazardous waste or any constituent of it may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

The Government is not required to establish, however, that the waste in question actually entered into the environment, was emitted into the air or discharged into the water. It is sufficient for the Government to prove that the hazardous waste was placed into or on land in such a manner that it could enter into the environment, air, or water, including ground water.

INSTRUCTION NO. 11
HAZARDOUS WASTE LISTING

You are instructed that the Environmental Protection Agency has listed as hazardous the following wastes:

> The spent halogenated solvent, methylene chloride, and all spent solvent mixtures and/or blends containing, before their use, a total of ten percent or more by volume of methylene chloride.

You are further instructed that pursuant to the regulations of the Environmental Protection Agency and the Arkansas Department of Pollution Control and Ecology, when a listed hazardous waste is mixed with a solid,

liquid, or semisolid material, the resulting mixture is also a hazardous waste.

INSTRUCTION 12

An act is done "knowingly" if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

The purpose of adding the word "knowingly" was to insure that no one would be convicted for an act done because of mistake, or accident, or other innocent reason.

The Government is not required to prove that the defendant knew he was violating the law.

INSTRUCTION NO. 13
PROOF OF ENVIRONMENTAL HARM NOT REQUIRED

Under the Resource Conservation and Recovery act, the Government is not required to prove that the disposal of hazardous wastes caused any damage or harm to the environment. This act prohibits the disposal of any hazardous wastes except in compliance with a permit or interim status.

INSTRUCTION NO. 14
INTERIM STATUS AND PERMITS

Under the Resource Conservation and Recovery Act, in order to lawfully dispose of hazardous waste, the defendant must have either received a permit from the state of Arkansas allowing such disposal or been granted "interim status".

In order to qualify for "interim status", the defendants must have notified the Environmental Protection Agency or the Arkansas Department of Pollution Control and Ecology that they operated a hazardous waste facility and filed an application for a hazardous waste disposal permit.

INSTRUCTION NO. 15

Each of the defendants has pleaded "not guilty" to the charges contained in counts one through four of the indictment. This plea puts in issue each of the essential elements of the offense as described in this instructions, and imposes on the Government of establishing each of these elements by proof beyond a reasonable doubt.

INSTRUCTION NO. 16
CERCLA-ELEMENTS

Counts five through eight of the indictment charge the defendants with violations of the Comprehensive Environmental Response Compensation and Liability Act (CERCLA).

In order to prove a violation of this act, the Government has the burden of proving the following essential elements:

One, that on or about the date charged in the indictment, the defendant was in charge of a facility;

Two, that the defendant knew of the release into the environment from the facility of a hazardous substance in an amount in excess of the reportable quantity;

Three, that the defendant failed to notify the appropriate federal agency, the National Response Center, of the release;

Four, that the defendant did not have a permit for the release.

INSTRUCTION NUMBER 17
CERCLA – DEFINITIONS

The term "facility" is defined in the act to include any building, structure, installation, pipe or pipeline . . . well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft or any site or area where a hazardous substance has been deposited, stored, disposed of, or placed or otherwise come to be located . . .

The term "person in charge" includes both individuals and corporations responsible for the facility. An individual may be the person in charge of a facility even if he did not have sole control over the facility. All that is necessary is that the individual have a management or a supervisory function and be responsible for the operation of the facility. With regard to a particular facility, there may be more than one person in charge. The person in charge does not have to be the highest ranking individual at a facility.

The term "release" is defined as any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment.

The term "environment" is defined to include any land surface or subsurface strata within the United States . . .

The term "hazardous substance" is defined to include any hazardous waste listed under the Resource Conservation and Recovery Act. Therefore, because it is listed as an F002 hazardous waste, the spent solvent methylene chloride, and spent solvents which contained more than ten percent methylene chloride before use are hazardous substances.

INSTRUCTION NO. 18
REPORTABLE QUANTITY

The reportable quantity for the release of a hazardous substance that is listed as an F002 waste is one pound.

INSTRUCTION NUMBER 19

Each of the defendants has pleaded "not guilty" to the charges contained in counts five through eight of the indictment. This plea puts in issue each of the essential elements of the offense as described in these instructions, and imposes on the Government the burden of establishing each of these elements by proof beyond a reasonable doubt.

INSTRUCTION NO. 20
RCRA-FAILURE TO FILE APPLICATION (ELEMENTS)

In count nine of the indictment, Goodner Brothers Aircraft, Inc. and Albert Goodner are charged with violating the Resource Conservation and Recovery Act by

knowingly failing to file a permit application with the Environmental Protection Agency or the Arkansas Department of Pollution Control and Ecology which is necessary for the treatment, storage, and disposal of hazardous waste.

Pursuant to the regulations adopted by the Environmental Protection Agency and the Arkansas Department of Pollution Control and Ecology, anyone who treats, stores, disposes of or generates a hazardous waste is required to file a permit application with the agencies.

The Government has the burden of proving the following essential elements:

> One, that on or about the dates alleged in the indictment, defendants knowingly generated, stored, treated, transported, disposed of, exported or otherwise handled waste;
>
> Two, that the defendants knew that the waste had the potential to be harmful to others or to the environment;
>
> Three, the wastes were listed or identified by the Environmental Protection Agency as a hazardous waste pursuant to the Resource Conservation and Recovery Act;
>
> Four, that the defendants knowingly failed to file or commanded and caused others not to file the application; and
>
> Five, that the application was required by the regulations to be filed.

INSTRUCTION NO. 21
FILING REQUIREMENT

The laws of the United States require anyone who generates a hazardous waste and then handles it to notify the state and federal regulatory authorities of this fact.

A "generator" includes any person or corporation whose acts or process produces a hazardous waste or whose act first causes a hazardous waste to become subject to regulation. If the defendants were generators of hazardous waste, then the legal duty to notify state and federal regulators exists.

INSTRUCTION NO. 22

Each of the defendants has pleaded "not guilty" to the charge contained in count nine of the indictment. This plea puts in issue each of the essential elements of the offense as described in these instructions, and imposes on the Government the burden of establishing each of these elements by proof beyond a reasonable doubt.

THE COURT: I need to make a slight correction in one of the instructions. I just noticed something we thought we had removed and didn't.

INSTRUCTION NO. 23
CORPORATE RESPONSIBILITY

Defendant Goodner Brothers Aircraft, Inc., is a corporation. A corporation may be found guilty of a criminal offense.

A corporation can act only through its agents, that is – its directors, officers, employees, and other persons authorized to act for it.

To find a corporate defendant guilty you must find beyond a reasonable doubt that:

One, each essential element of the crime charged against the corporation was committed by one or more of its agents;

Two, in committing those acts, the agent or agents intended, at least in part, to benefit the corporation, and

Three, each act was within the scope of employment of the agent who committed it.

For an act to be within the scope of an agent's employment, it must relate directly to the performance of the agent's general duties for the corporation. It is not necessary that the act itself have been authorized by the corporation.

If an agent was acting within the scope of his employment, the fact that the agent's act was illegal, contrary to his employer's instructions or against the corporation's policies will not relieve the corporation of responsibility for it.

INSTRUCTION NO. 25

Statements and arguments of counsel are not evidence in the case unless made as an admission or stipulation of fact. When the attorneys on both sides stipulate or agree as to the existence of a fact, you must, unless

otherwise instructed, accept the stipulation as evidence, and regard that fact as proved.

Unless you are otherwise instructed, the evidence in the case always consists of the sworn testimony of the witnesses, regardless of who may have called them; and all exhibits received in evidence, regardless of who may have produced them; and all facts which may have been admitted or stipulated; and all applicable presumptions stated in these instructions.

Any evidence as to which an objection was sustained by the Court, and any evidence ordered stricken by the Court, must be entirely disregarded.

Unless you are otherwise instructed, anything you may have seen or heard outside the courtroom is not evidence, and must be entirely disregarded.

You are to consider only the evidence in the case, but in your consideration of the evidence, you are not limited to the bald statements of the witnesses. In other words, you are not limited solely to what you see and hear as the witnesses testify. You are permitted to drawn, from facts which you find have been proved, such reasonable inferences as you feel are justified in the light of experience.

INSTRUCTION NO. 26

If a lawyer asks a witness a question which contains an assertion of fact, you may not consider the assertion as evidence of that fact. The lawyers' statements are not evidence.

INSTRUCTION NO. 27
15.02 (DIRECT EVIDENCE-CIRCUMSTANTIAL EVIDENCE)

There are two types of evidence from which you may find the truth as to the facts of a case – direct and circumstantial evidence. Direct evidence is the testimony of one who asserts actual knowledge of a fact, such as an eyewitness; circumstantial evidence is proof of a chain of facts and circumstances indicating the guilt or innocence of a defendant. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You should weigh all the evidence in the case. After weighing all the evidence, if you are not convinced of the guilt of the defendant beyond a reasonable doubt, you must find him not guilty.

INSTRUCTION NO. 28
15.22 (OPINION EVIDENCE – EXPERT WITNESS)

The rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions. An exception to this rule exists as to those whom we call "expert witnesses." Witnesses who, by education and experience, have become expert in some art, science, profession, or calling, may state an opinion as to relevant and material matter, in which they profess to be expert, and may also state their reasons for the opinion.

You should consider each expert opinion received into evidence in this case, and give it such weight as you may think it deserves. If you should decide that the

opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence, you may disregard the opinion entirely.

INSTRUCTION NO. 29
18.02 (PUNISHMENT)

The punishment provided by law for the offenses charged in the indictment is a matter exclusively within the province of the Court, and should never be considered by the jury in any way, in arriving at an impartial verdict as to the guilt or innocence of the accused.

INSTRUCTION NO. 30
17.12 (CREDIBILITY OF ACCUSED AS WITNESS)

A defendant who wishes to testify is a competent witness; and the defendant's testimony is to be judged in the same way as that of any other witness.

INSTRUCTION NO. 31
(CREDIBILITY OF WITNESSES)

In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness said, or only part of it, or none of it.

In deciding what testimony to believe, consider the witnesses' intelligence, their opportunity to have seen or heard the things they testify about, their memories, any motives they may have for testifying a certain way, their

manner while testifying, whether they said something different at any earlier time, the general reasonableness of their testimony, and the extent to which their testimony is consistent with other evidence that you believe.

INSTRUCTION NO. 32
74.01

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another, and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence in the case with you fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence, solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Remember at all times that you are not partisans. You are judges – judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

INSTRUCTION NO. 33
74.04
(ELECTION OF FOREPERSON – GENERAL VERDICT)

Upon retiring to the jury room, you will select one of your number to act as your foreperson. The foreperson will preside over your deliberations, and will be your spokesman here in Court.

Forms of verdict have been prepared for your convenience.

THE COURT: What we've done, ladies and gentlemen, and what you'll take back and actually answer, are what we call forms of verdict that are just sheet of paper that says – one of them says: We the jury in the above entitled and numbered case find the defendant Albert S. Goodner, Jr. as to count one – and then a place where you check either guilty or non guilty. That's true of each count of the indictment, in other words, a separate line for each count of the indictment.

What you should do, of course, when you go in is elect a jury foreperson who sort of takes the votes and speaks here in Court. After that's done, you should attempt – and you can do it in whatever order you wish, but you should attempt to determine whether you believe the defendant – and it doesn't even make any difference which defendant you take up first – but the defendant that you're considering, whether he or it, in the case of the corporation, is guilty as to each count.

As you do that, you may refer, of course, to the indictment to see for certain that you know what count

you're talking about. After you have determined in relation to a particular count, guilty or innocent by a unanimous vote – it must be unanimous, as I've said – you should have your foreperson check the proper place, either guilty or not guilty. After you've done that, go on to the next count or whichever count you want to until you complete all of them. After you've completed a sheet, there's a sheet for Mr. Goodner, Jr. and a sheet for Goodner Brothers Aircraft, Incorporated. After you've completed a sheet, have your person date it – your foreperson – date it, sign it, and when you've completed one, then you go on to the other sheet, whichever one you want to go to first.

Now, you've heard testimony and talk about other – at least one other corporation and other individuals who at one time or another were involved in the operation down there. The verdict forms that you're receiving are the only people, the only entities, Mr. Goodner and Goodner Brothers Aircraft, Incorporated, are the only defendants that are left in the lawsuit at this time for which you must determine the guilt or innocence of. Disregard any other testimony you've heard, at least about guilt or innocence of those people, and decide the guilt or innocence only of Mr. Goodner, Jr. and Goodner Brothers Aircraft, Incorporated. They're the only two verdict forms you have, okay?

INSTRUCTION NO. 34
18.10 (VERDICT-JURY'S RESPONSIBILITY)

It is proper to add the caution that nothing said in these instructions – nothing in any form of verdict prepared for your convenience – is to suggest or convey in any way or manner any intimation as to what verdict I think you should find. What the verdict shall be is the sole and exclusive duty and responsibility of the jury.

Supreme Court, U.S.
FILED
DEC 9 1992
OFFICE OF THE CLERK

No. 92-607

In the Supreme Court of the United States

OCTOBER TERM, 1992

ALBERT S. GOODNER, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether paint waste (consisting of spent solvent, dissolved paint, and waste water) constitutes a hazardous substance under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

2. Whether dumping a hazardous substance into open, unlined holes in the ground constitutes the release of a hazardous substance into the environment, in violation of CERCLA.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 22-35) is reported at 966 F.2d 380. The sentencing decision of the district court (Pet. App. 9-21) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 1992. A petition for rehearing was denied on July 7, 1992. Pet. App. 36. The petition for a writ of certiorari was filed on October 5, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner operates Goodner Brothers Aircraft, Inc. (GBA), an aircraft refinishing business in Mena, Arkansas. At the times relevant to this case, petitioner and his employees sprayed a solvent containing between 50 and 70% methylene chloride on airplanes to remove paint from them. The solvent caused the paint to blister and fall off. As an airplane was stripped, the solvent, peeled paint, and rinsewater were collected on the floor of the hangar. Petitioner and his employees scooped this waste, which contained paint residue, spent stripper, and water, from the hangar floor into barrels. Tr. 181, 190, 198, 219, 225. Waste was placed in the barrels until they were three-quarters full; when approximately 15 or 20 barrels had accumulated, petitioner directed employees to take them to the Goodner Brothers Farm. There, the employees dumped the contents into either of two ravines or a man-made pit. On one occasion, the contents were loaded into the back of a dump truck and the truck transported the waste to the farm. 1 Tr. 188-194, 199. Petitioner dumped approximately 25 tons of the waste on the farm. Pet. App. 23.

The United States Environmental Protection Agency (EPA) began investigating the GBA facility in September 1988. After obtaining a search warrant, EPA took samples of material coming off the planes and found in the dumpsites. All of the samples found on the farm contained methylene chloride and phenol, with some samples containing as much as 20% of each substance. Pet. App. 24.

2. Section 103(b) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9603(b), renders criminally

liable any person "in charge of a facility from which a hazardous substance is released, other than a federally permitted release, * * * who fails to notify immediately the appropriate agency of the United States Government as soon as he has knowledge of such release." CERCLA defines "hazardous substance" as, *inter alia*, "any hazardous waste having the characteristics identified under or listed" pursuant to Section 3001 of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6921. See 42 U.S.C. 9601(14). RCRA in turn authorizes the Administrator of EPA to specify "criteria for identifying the characteristics of hazardous waste" and for listing particular wastes as hazardous. 42 U.S.C. 6921(a). Exercising that authority, EPA has listed as a hazardous waste:

> The following spent halogenated solvents: * * * methylene chloride * * * ; [and] all spent solvent mixtures/blends containing, before use, a total of ten percent or more (by volume) of one or more of the above halogenated solvents * * *.

40 C.F.R. 261.31(a), F002. This F002 listing regulation includes all spent (or used) solvent mixtures or blends that contain ten percent or more of methylene chloride before use.[1]

CERCLA defines a "facility" as:

> any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer

---

[1] In addition to listing specific wastes, EPA has defined as a hazardous waste certain mixtures of solid waste and hazardous waste. 40 C.F.R. 261.3(a)(2)(iv). EPA originally promulgated that regulation in 1980. 45 Fed. Reg. 33,084, 33,119-33,120 (1980). The D.C. Circuit invalidated that regulation on procedural grounds in 1991. *Shell Oil Co.* v. *EPA*, 950 F.2d 741 (1991). EPA has since repromulgated the regulation. 57 Fed. Reg. 7628, 7632-7633 (1992).

> or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, *storage container*, *motor vehicle*, rolling stock, or aircraft. * * *.

42 U.S.C. 9601(9)(A) (emphasis added). A "release" is:

> any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, *dumping*, or disposing *into the environment* (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant) * * *.

42 U.S.C. 9601(22) (emphasis added). Finally, the term "environment" includes:

> any * * * surface water, ground water, drinking water supply, *land surface* or subsurface strata, or ambient air within the United States * * *.

42 U.S.C. 9601(8)(B) (emphasis added).

3. The grand jury indicted petitioner and GBA on nine counts. Counts 1 through 4 charged petitioner and GBA with dumping a hazardous waste without a permit, in violation of RCRA, 42 U.S.C. 6928(d)(2)(A). Counts 5 through 8 charged petitioner and GBA with releasing a hazardous substance from a facility without notifying the National Response Center, in violation of CERCLA, 42 U.S.C. 9603(b). Count 9 charged petitioner and GBA with failing to apply for a hazardous waste permit, in violation of RCRA, 42 U.S.C. 6928(d)(4). Pet. App. 1-8.

At trial, the district court gave the jury separate instructions for each set of counts. For the first set of RCRA counts (Counts 1-4), the court instructed

the jury that the term "hazardous waste" includes particular listed wastes. Pet. App. 65 (Instruction No. 11). The court then read the spent solvent listing and further instructed the jury that "pursuant to the regulations of [EPA] and the Arkansas Department of Pollution Control and Ecology, when a listed hazardous waste is mixed with a solid, liquid, or semisolid material, the resulting mixture is also a hazardous waste." Pet. App. 65-66. For the other RCRA count (Count 9), the court instructed the jury that the government had the burden of proving that "the wastes were listed or identified by [EPA] as a hazardous waste pursuant to the Resource Conservation and Recovery Act." Pet. App. 70 (Instruction No. 20).

For the CERCLA counts (Counts 5-8), which are at issue here, the district court instructed the jury that "[t]he term 'hazardous substance' is defined to include any hazardous waste listed under the Resource Conservation and Recovery Act. Therefore, because it is listed as an F002 hazardous waste, the spent solvent methylene chloride, and spent solvents which contained more than ten percent methylene chloride before use are hazardous substances." Pet. App. 69 (Instruction No. 17). The defendants failed to object to these instructions, despite having been furnished an opportunity to do so by the district court. 3 Tr. 178-180, 251.

The jury found GBA guilty on four counts of disposing of a hazardous waste without a permit (Counts 1-4) and found petitioner guilty on three counts of failing to notify authorities of a release of a hazardous substance (Counts 6-8). The jury also convicted both defendants of failing to file for a haz-

ardous waste permit (Count 9). The district court sentenced petitioner to 15 months' imprisonment, to be followed by one year of supervised release, as well as a $7500 fine. GBA was sentenced to five years' probation and a $150,000 fine. Pet. App. 9-21, 24-25.

4. The court of appeals affirmed in part and reversed in part. Pet. App. 22-35. While the appeal was pending, the D.C. Circuit, in *Shell Oil Co.* v. *EPA*, 950 F.2d 741 (1991), invalidated EPA's mixture regulation. See note 1, *supra*. After receiving post-argument briefs on the impact of *Shell Oil* on this case, the court of appeals vacated the convictions of petitioner and GBA on the RCRA counts. Because Instruction No. 11 (which related to Counts 1-4) referred to the mixture regulation, the court of appeals concluded that "it is impossible to determine whether the jury found the waste to be a listed F002 waste or whether it relied upon the invalidated mixture rule." Pet. App. 27. The court also noted that Instruction No. 20 (which related to Count 9) contained no separate instruction concerning the term "hazardous waste," and that the definition of "hazardous waste" for all of the RCRA counts "presumably is the one given in jury instruction number 11." *Id.* at 30. The court of appeals therefore reversed the RCRA convictions on those five counts and remanded for a new trial. *Id.* at 29-30.

However, the court of appeals affirmed petitioner's convictions on the CERCLA counts. It reasoned that Instruction No. 17 "specifically identified the waste as a listed F002 hazardous waste and, consequently, eliminated any need for the jury to rely upon the mixture rule." Pet. App. 31-32. The court of appeals also rejected petitioner's contention that his dumping

of waste into ravines and a man-made pit was not a "release" of a hazardous substance from a "facility" into the "environment," finding petitioner's argument contrary to the plain language of the statute. *Id.* at 33.

ARGUMENT

The court of appeals correctly decided, based on a reading of the jury instructions, that petitioner's convictions on three counts under CERCLA were not based on EPA's invalidated mixture rule under RCRA. The court also correctly held that, on the facts of this case, petitioner released a hazardous substance into the environment. Those holdings do not conflict with any decision of this Court or of any court of appeals. Further review is not warranted.

1. Petitioner contends (Pet. 9-22) that the court of appeals violated the rule of lenity in holding that the waste involved here is a hazardous substance under EPA's F002 listing regulation. The rule of lenity has no application here. It is a rule of statutory construction that is employed only to resolve a "grievous ambiguity or uncertainty." *Huddleston* v. *United States*, 415 U.S. 814, 831 (1974). This Court will rely on the rule only when it is "left with an ambiguous statute" after "seizing every thing from which aid can be derived." *United States* v. *Bass*, 404 U.S. 336, 347 (1971) (quoting *United States* v. *Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805) (Marshall, C.J.)).[2] In other words, "[t]he rule comes into

[2] For this Court's most recent discussions of the rule, see *United States* v. *Thompson/Center Arms Co.*, 112 S. Ct. 2102, 2109-2110 (1992); *Chapman* v. *United States*, 111 S. Ct. 1919, 1926-1927 (1991), and *Moskal* v. *United States*, 111 S. Ct. 461, 465 (1990).

operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers." *Callanan* v. *United States*, 364 U.S. 587, 596 (1961).

Petitioner claims that the regulations defining hazardous waste are ambiguous. He argues that because the F002 listing regulation does not specifically include the term "paint waste," the regulation, as read in light of the rule of lenity, cannot include the waste he released into the environment. Contrary to petitioner's contention, the regulation unambiguously applies to the waste at issue here.

EPA has listed as a hazardous waste "[t]he following spent halogenated solvents: * * * methylene chloride * * *; [and] all spent solvent mixtures/blends containing, before use, a total of ten percent or more (by volume) of one or more of the above halogenated solvents." 40 C.F.R. 261.31(a), F002.[3] The jury heard testimony that the waste involved here consisted of, *inter alia*, the spent solvent methylene chloride. 1 Tr. 190. The stripper that petitioner utilized contained (before use) between 50 and 70% methylene chloride, and many of the samples found at the dumpsites contained more than 20% methylene chloride. Pet. App. 23, 24, 32. Petitioner used the stripper for its solvent properties (*i.e.*, to remove paint from aircraft),[4] and when he could no longer use the solvent for stripping aircraft, he dumped it.

---

[3] EPA has defined "spent material" as "any material that has been used and as a result of contamination can no longer serve the purpose for which it was produced without processing." 40 C.F.R. 261.1(c)(1).

[4] See 50 Fed. Reg. 53,315, 53,316 (1985).

In these circumstances, the listing unquestionably applies to the waste petitioner disposed of at the farm. See *United States* v. *McDonald & Watson Waste Oil Co.*, 933 F.2d 35 (1st Cir. 1991) (affirming CERCLA conviction for toluene-contaminated soil). The rule of lenity "only serves as an aid for resolving an ambiguity; it is not to be used to beget one." *Callanan* v. *United States*, 364 U.S. at 596. Petitioner seeks to beget an ambiguity where none exists.

2. a. Petitioner's argument (Pet. 22-26) that he did not release a hazardous substance from a facility into the environment is equally without merit. At trial, the government proved that petitioner released (*i.e.*, dumped) a hazardous substance (*i.e.*, the solvent) from a facility (*i.e.*, the storage containers and dump truck) into the environment (*i.e.*, the land surface, which in this case included the natural ravines and man-made pit). The Eighth Circuit properly held that "[u]nder the plain language of the statute, the uncontroverted evidence that the paint waste was dumped from the barrels onto the land falls within the statutory language." Pet. App. 33.

Petitioner argues that his convictions cannot stand because a pit also falls within the statutory definition of "facility" (see 42 U.S.C. 9601(9)(A)) and the government did not show that the waste migrated from the pit farther into the land. Petitioner did not object at trial to the jury instructions on this issue, and his convictions therefore may be reviewed only for plain error. *United States* v. *Young*, 470 U.S. 1, 14-16 (1985). There was no plain error in the district court's instructions applying CERCLA to the facts of this case.

Congress wrote the definitions of CERCLA broadly to cover a wide variety of circumstances. As a re-

sult, the statutory definitions may overlap in certain respects. In this case, the government was required to show only a release from a "facility" into the "environment," and it satisfied that burden by proving that petitioner ordered the paint waste to be dumped from barrels or a dump truck into the two ravines and a man-made pit. The ravines and pit were not facilities (even though a pit might in some circumstances *serve* as a facility); they were part of the environment. This fact-bound issue does not warrant further review.

b. Petitioner is incorrect in contending (Pet. 24-26) that the Eighth Circuit's application of CERCLA's plain language conflicts with decisions of two other circuits. *Fertilizer Institute* v. *EPA*, 935 F.2d 1303 (D.C. Cir. 1991), is inapposite. There, the court of appeals vacated part of a proposed rule that would have required notification any time a hazardous substance is placed into any unenclosed containment structure, including an open tank. *Id.* at 1309-1310. In this case, however, petitioner dumped a hazardous substance into unlined holes (including two natural ravines) in the earth. Those pits form part of the environment under the statutory definition. 42 U.S.C. 9601(8)(B) (environment is "any * * * land surface * * * within the United States"). They are not unenclosed containment structures.

The supposed conflict with *United States* v. *Baytank (Houston), Inc.*, 934 F.2d 599 (5th Cir. 1991), is based on petitioner's misreading of that case. In *Baytank*, the government appealed from the district court's grant of a new trial in a CERCLA case after the jury had found the defendants guilty. The district court had instructed the jury that a release into containment structures was not a release into the en-

vironment "unless you find that a reportable quantity of the chemical evaporated or otherwise traveled beyond the confines of the containment structure." *Id.* at 619. The Fifth Circuit reversed, holding that the government had introduced sufficient evidence to support conviction and that the district court abused its discretion in ordering a new trial. *Id.* at 619-620. The Fifth Circuit in *Baytank* did not hold that the jury was *required* to find that the hazardous substance in that case volatilized into the air. It simply held that, even under the instructions that the district court gave the jury, the government had proved its case beyond a reasonable doubt. Moreover, it is unclear whether the containment structure in *Baytank* had any contact with the environment, other than contact with the ambient air. In this case, by contrast, the hazardous substance was dumped directly into natural ravines and a man-made pit in the ground. Those surfaces clearly fall within the statutory definition of the "environment." 42 U.S.C. 9601(8)(B).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 92-607

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October Term, 1992

ALBERT S. GOODNER, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

REPLY BRIEF OF PETITIONER, ALBERT S. GOODNER, JR.

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No. 92-607

In The

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v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF OF PETITIONER, ALBERT S. GOODNER, JR.

Petitioner, Albert S. Goodner, Jr., respectfully files this his Reply to the Brief For the United States in Opposition to Petitioner's request that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered on June 4, 1992.

ARGUMENT

I.

PAINT WASTE IS A SPENT SOLVENT IF 2 + 2 = 5 (WITH APOLOGIES TO GEORGE ORWELL)[1]

Both in the trial court and on appeal the Environmental Protection Agency ("EPA") urged that the "paint waste" generated at Goodner Brothers Aircraft facility was hazardous because it *contained* a solvent. In its Brief in Opposition, the EPA not only discards its position in the trial court, but likewise chooses not to defend the crucial holding of the Eighth Circuit adopting EPA's position. Instead, EPA now argues for the first time that the "paint waste" – consisting of peeled paint, residues of the solvent used to soften the paint, and, occasionally, water – *is* a "spent" solvent – *i.e.* a solvent that can no longer be used. Brief in Opp. at 8. To repeat, EPA is not arguing, as it has before, and as the Eighth Circuit incorrectly believed, that the "paint waste" is hazardous because it *contained* a solvent. Rather, EPA baldly insists the "paint waste" is not "paint waste" but instead is "spent solvent." EPA's latest construct itself violates the rule of lenity, because it is at odds with the terms used to define an "F002" waste, is inconsistent with related regulatory provisions, and is, to put it plainly, nonsense.

---

[1] EPA's argument as to the meaning of the "F002" designation evokes the following exchange in Orwell's novel *"1984"* between Winston and O'Brien, his interrogator:

"How can I help it?" he blubbered. " How can I help seeing what is in front of my eyes? Two and two are four."

"Sometimes, Winston. Sometimes they are five. Sometimes they are three. Sometimes they are all of them at once."

ORWELL, 1984, 254 (Harcourt, Brace & World, Inc. ed. 1949).

When EPA argues that the "paint waste" is a "spent solvent," it implicitly asserts that "paint waste" is described by the definition for the listed hazardous waste identified as "F002." That designation actually describes only two very specific wastes – "spent halogenated solvents," and "still bottoms from the recovery of these spent solvents." App. at 54. Nowhere does the definition of an "F002" waste mention, suggest, or remotely intimate that "paint waste" of the type generated at the Goodner Brothers Aircraft facility is included in the "F002" designation. *Id.* In fact, the inclusion of "still bottoms" in the definition of an "F002" waste underscores the fact that the phrase "spent solvents" describes a limited class of wastes. If the phrase "spent solvents" was intended to have as broad a meaning as EPA now suggests – that is, any substance or material bearing any trace or residue of a solvent – inclusion of still bottoms in the definition of "F002" wastes is redundant, for still bottoms necessarily contain solvent. EPA's position, then, must ultimately rest on the premise that the phrase "spent solvents" is a broadly generic description. Only then can it implicitly argue that "F002" wastes include "paint waste," because that waste certainly is not explicitly included. But to paraphrase *Krause*, unless EPA's latest understanding is "self-evident" from the terms used to define an "F002" waste – which it is not – Albert Goodner, Jr. cannot be criminally prosecuted for failing to divine that "spent solvents" included not-spent-solvents such as "paint waste."

Yet, the absence of any mention of "paint waste" in the definition of an "F002" waste is not surprising. The

two wastes are very different. EPA considers a "spent material" such as "spent solvents" as a substance that can be reprocessed into a usable product. *See,* 40 C.F.R. 261.1(c)(1). That definition is buttressed in the "F002" listing by the specific identification of still bottoms "from the recovery of the spent solvents" as a waste. App. at 54. By "spent," EPA obviously does not mean used up or consumed, but exhausted, where a material presents the appearance of the original product but is no longer functional. For the "F002" definition to be internally consistent, as well as consistent with the general definition of "spent" material, only those substances (i) with the appearance of a solvent and (ii) capable of reprocessing for use as a solvent, are described by the "F002" designation.

Here the waste generated – consisting of peeled paint, residues of the solvents used to soften the paint, and, occasionally, water – is a separate, identifiable, unitary waste generated as a result of paint stripping. The waste is not, as EPA incorrectly asserts, solvent that can no longer be used for its solvent properties. The waste does not look like a solvent.[2] The waste can *not* be reprocessed to produce usable solvent. The waste is not a "spent solvent." The waste is "paint waste."

EPA clearly understands the distinction. When the hazardous waste rules were first proposed, they identified "paint waste (such as used rags, slops, latex sludge,

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[2] Throughout its brief, EPA consciously and incorrectly describes the paint waste with words suggesting that waste is almost entirely liquid solvent. That picture is wrong. If the full record were available, EPA's misleading "spin" could be readily exposed.

spent solvent)" and "waste paint and varnish remover or stripper" as "listed" wastes, in addition to and separate from those wastes ultimately identified as "F002" wastes. 43 Fed. Reg. 58,946, 58,957 (Dec. 18, 1978). EPA later identified "paint residues or sludges generated from industrial painting in the mechanical or electrical products industry" as "listed" waste "F017," just as an "F002" waste was designated a "listed" waste. On January 16, 1981, the paint residue listing was "suspended temporarily." 46 Fed. Reg. 4617 (Jan. 16, 1981). The "temporary suspension" remains in effect, eleven years later. Having recognized a distinction between "paint waste" and "F002" waste, and acted upon it, EPA cannot now claim that "paint waste" was "plainly" included in the "F002" designation, at least not in a criminal prosecution.

Although it should not be necessary, EPA's latest position can easily be shown to produce nonsensical results. If EPA is right, rags used to wipe a stripped plane are not waste rags, they are "spent solvent" at least if *any* solvent is present on the rag. Sand or grit used to absorb solvent that may have fallen on the ground during the stripping process is not waste sand or grit, but spent solvent. In fact, if the wing of a plane being repainted is found to be defective and discarded after the paint is removed, and if the wing contains *any* amount of solvent, the wing is not a wing but spent solvent. The rule of lenity should prevent Albert Goodner, Jr., or one of his small business colleagues, from being criminally prosecuted for believing, in their naiveté, that waste rags are waste rags, waste sand or grit is waste sand or grit, and a discarded wing is a discarded wing.

Perhaps EPA could have defined all of the "wastes," just described, including "paint wastes," as "F002" wastes. Perhaps EPA could by rule mandate that 2 + 2 =5. (Many believe it has already done so on several occasions.) But to prosecute a citizen criminally for thinking that 2 + 2 = 4, EPA must spell out its contrary rule clearly and unambiguously. If there is any question about whether 2 + 2 = 5, the rule of lenity demands that 2 + 2 *not* equal 5. The "F002" listing does not clearly and unambiguously describe "paint waste." EPA's assertion otherwise is an incredibly desperate argument to avoid the rule of lenity and the teaching of *Krause*. Whatever the rule may be for regulation-drafting or civil enforcement proceedings, and no matter how inconvenient it may prove to an eager law enforcer; EPA cannot use *criminal* prosecutions to seek broad interpretations of narrowly drawn statutory or regulatory language.

II.

ARGUING AS EPA DOES THAT RAVINES AND PITS ARE BOTH A "FACILITY" AND THE "ENVIRONMENT" MAY BE ACCEPTABLE IN QUANTUM PHYSICS, BUT IT IS AN UNACCEPTABLE CONSTRUCTION OF A CRIMINAL STATUTE

Petitioner's position on appeal is that the ravines or pits are a "facility," as that term is defined in CERCLA, and because there was no evidence presented to the jury of a release from those "facilities" into the "environment," the CERCLA convictions must be set aside. The jury instructions included the correct definitions of "facility" and "environment." The jury could not, however, under the evidence before it, have concluded that there

was a failure to notify the EPA, because there was no evidence of a release from a "facility" (the ravines or pits) into the "environment."[3] At most there was proof of movement of material from one "facility" (the drums or truck) to another "facility" (the ravines or pits). The error was not with the instructions, but with the proof.

Not surprisingly, EPA urges that the ravines and pits were not a "facility" but "the environment." Amazingly, however, EPA concedes that "a pit [and logically then, a ravine] might in some circumstances serve as a facility." Brief in Opp. at 10. Apparently, EPA will get back to us later on when a ravine or a pit is a "facility" as opposed to the "environment." Such an approach to statutory construction, "maybe it is, maybe it isn't," may be acceptable in a civil context. It is totally inappropriate in a criminal setting. The rule of lenity mandates that if the ravines and pits could be considered a "facility" and such a construction prevents conviction, that is the construction the courts must follow. EPA cannot have it both ways in a criminal setting.

CONCLUSION

The Petition for a Writ of Certiorari should be granted, not only to set aside Mr. Goodner's convictions

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[3] EPA's burden to show a release is light, if a release in fact occurred. The agency simply made no effort to carry the burden in this case.

but to send a signal that the rule of lenity is alive and well in the prosecution of environmental crimes.

Respectfully submitted,

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